THE

# INSTITUTES OF JUSTINIAN

## ILLUSTRATED BY ENGLISH LAW.

BY

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# PREFACE.

My reason for attempting a work like the present is the remembrance of the difficulty which I found as a student in comparing Roman law as I read it with our own system. Legal writers treat the subject either very shortly, or else only incidentally, as far as it is applicable to a particular branch of law. Lord Mackenzie, Sir P. Colquhoun, and Mr. Poste are examples of the first kind; Mr. Benjamin and Mr. Pollock of the second.

Some of the comparisons in the succeeding pages may not meet with universal acceptance. I have tried, as far as possible, to avoid far-fetched analogies, but in occupying a ground hitherto almost untouched, I cannot hope to have avoided some errors. I have dealt with antiquarian matters less than I should like to have done, but it was necessary to confine the work within moderate bounds.

In the case of text-books of universal use, new editions of which are continually appearing (such as Stephen's Commentaries, and Williams on Real Property), the chapter rather than the page has been cited, in order to facilitate reference to any edition.

It has been thought sufficient in a work primarily intended for students to refer to only one report of each case.

J. W.

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# ADDENDA.

P. 4. *Jus gentium* is used by Sir R. Phillimore and others as a synonym of Private International Law, and as opposed to *jus inter gentes*, or Public International Law. See 4 Phillimore, Introd.

P. 5. The villein resembled the *colonus* far more than the *servus* (1 Reeves, Introd. li.). The word *colonus* occurs in the Laws of William the Conqueror, c. 29, where it evidently signifies a villein. The difference between the *colonus adscriptitius* and the *colonus inquilinus* (for which see Ortolan, s. 489) is not unlike that between the villein and his later representative, the copyholder.

P. 8. References to the rules made under the Judicature Act, 1875, must now be read subject to the alterations made by the new rules of 1883.

P. 9. Old decisions may be overridden by (1) new principles, (2) the new application of old principles. As to (1), an example is afforded by the case of glass windows. In Henry VII.'s time they were considered to belong to the executor, because the house was perfect without them (Amos on Fixtures, 86). But in 41 Eliz. it was held that the heir should have them, and not the executor, for without glass it is no perfect house (4 Rep. 63 b). As to (2), a certain power of quasi-legislation is left to an English judge, empowering him, within very narrow limits, to disregard previous decisions which may have become obsolete by the advance of society. See the judgment of Stephen, J., in *Reg.* v. *Coney*, 8 Q. B. D. 551. In *Reg.* v. *Ramsay* (separately published, 1883), Lord Coleridge says, "Though the principles of law remain

unchanged, yet (and it is one of the advantages of the common law) their application is to be changed with the changing circumstances of the times."

P. 65. *Possessiones* may also be used in Roman law in a non-technical sense, as in Dig. l. 16, 78.

P. 78. Another difference to be noticed is that in English law wills of personalty need to be proved, wills of realty need not be proved, except so far as by 20 & 21 Vict. c. 77, s. 61, provision is made for the probate in solemn form of a will affecting real estate after citation of persons interested. In Roman law no such difference was made between wills of immovables and wills of movables.

P. 92, par. 8. The law on this point seems to be altered by the effect of the Married Woman's Property Act, 1882, and the wife will now take a share in her own right (Wolstenholme, 7).

P. 148. In another direction the liability of the *caupo* was less than that of the innkeeper, for he could refuse to receive a traveller (Dig. iv. 9, 1), which the innkeeper cannot as a rule do (*R.* v. *Ivens*, 7 C. & P. 213).

P. 192. The nearest approach in English law to the *beneficium competentiæ* is the privilege from seizure under an execution of the wearing apparel, bedding, and tools and implements of trade of the judgment debtor to the value of five pounds (8 & 9 Vict. c. 127, s. 8).

P. 200. As to damage by dogs trespassing, it has been held that no action will lie for injury to crops, etc. (*Mason* v. *Keeling* 1 Ld. Raym. 606), unless the dog is of a mischievous disposition, and the master knows it (*Read* v. *Edwards*, 34 L. J. C. P. 31).

P. 222. Another form of protection is the liability of a plaintiff to have his action stayed if it is vexatious. See the judgment of Jessel, M.R., in *Peruvian Guano Co.* v. *Bolckwoldt*, 23 Ch. D. 230.

P. 225. Another point of similarity is that the *judex* in an action might be challenged *antequam lis inchoetur* (Cod. iii. 1, 16). In English law a party to an action has his challenge to the array or to the polls (3 Stephen, bk. v. ch. x.).

# INTRODUCTION.

WRITERS upon the sources of English law may be divided into two classes, those who regard the common law as wholly indigenous, or at any rate chiefly of Teutonic origin, and those who acknowledge the large debt which it owes to Roman law. Coke, Hale, Blackstone, Reeves, and Mr. O. W. Holmes (Lectures on the Common Law) are examples of the first class. On the other hand, the view of Savigny (History of Roman Law in the Middle Ages), Güterbock (Bracton and his relation to Roman law), Sir F. T. Palgrave, Mr. Spence, Sir T. Twiss (Introduction to the Rolls edition of Bracton), and Mr. Finlason (Introduction to Reeves), is that the present state of the common law is due to a greater or less extent to Roman law. The effect of Roman law upon English equity is undoubted. Putting equity out of the question, in spite of the prejudice for a long time felt by Englishmen against Roman law, an example of which appears in a petition of the Commons against the use of the civil law in the reign of Richard II., its influence is clearly traceable in the

*Leges Henrici Primi*, Glanvil, Bracton, and Britton. In the reign of Edward II. even a Chief Justice of the Common Pleas is reported to have said, "*Que respondez vous a la ley empiel* (*imperial*) *donques sur quel ley de terre est fondu*" (Year-Book, 5 Edw. II. 148). Other examples will be found in Mr. Finlason's Introduction to Reeves. In the eighteenth century Lord Mansfield attempted, not always successfully, to work into the English common law many of the principles of Roman law. Lord Hardwicke had already performed the same task for equity.

The *fact* of the influence can scarcely be contested; the *amount* of the influence is a very different question. On the terminology of law it was very great. From Roman law English law derives, among many other words, person, obligation, contract, possession, prescription, succession, condition, novation, exception, action, stipulation, presumption, procuration, capital, crime, homicide. The question then arises, Was any part of the Roman law ever used as a practical part of the English system? To this question Mr. Spence, Professor Güterbock, and Sir T. Twiss, would answer that such part of the Roman law as appears in Bracton was actually used in England in the reign of Henry III. On the other hand, Sir H. Maine wonders "that an English writer of the time of Henry III. should have been able to put off on his countrymen as a compendium of pure English law a treatise of which the entire form and a third of the contents were directly borrowed from the *Corpus Juris*" (Maine, ch. iv.). In some cases indeed Bracton uses expressions which could have had positively

no meaning in England, *e.g. actio legis Aquiliæ* (103 a), and possibly *exceptio*, see p. 213. On the whole, however, it seems probable that Bracton, a judge, with special opportunities for knowing the law and practice, adopted the Roman law only so far as it was applicable in England, but sometimes *per incuriam* followed his model a little too closely. The legal value of Roman law in English courts at present is thus summarized by Tindal, C.J.: "The Roman law forms no rule binding in itself on the subjects of these realms, but in deciding a case upon principle, where no direct authority can be cited from our books, it affords no small evidence of the soundness of the conclusion at which we have arrived, if it prove to be supported by that law—the fruit of the researches of the most learned men, the collective wisdom of ages, and the groundwork of the municipal law of most of the countries of Europe" (*Acton* v. *Blundell*, 12 M. & W. 324).

The coincidences between Roman and English law show how numerous are the principles and distinctions which all systems of law have in common (2 Austin, 1115). The part of the law in which the two systems approach the most nearly is, as might be expected, the Law of Things. The Law of Persons and the Law of Procedure naturally differ more as being more affected by local and historical reasons. It is worthy of notice at the same time that there are cases in both these branches of law in which a striking historical parallel may be drawn in the two systems. In the Law of Persons, the law as to the separate property of married

women has passed through nearly the same stages, though perhaps for different reasons. The position of the married woman in England, as far as regards her property, has been, since recent legislation, very like that of the married woman in the Roman Empire under Justinian. In the Law of Procedure, in both Roman and English law alike, the possessory tend to supersede the proprietary remedies from their greater convenience.

The differences may be grouped into two classes: (1) differences in the law, (2) differences in the signification of technical terms. It may be convenient to collect here some of the broad differences in the law which strike one at the outset. Of course, numerous others of a more minute kind will be found in almost every one of the following pages.

(1) "The theoretical descent of Roman jurisprudence from a code (the XII. Tables), the theoretical ascription of English law to immemorial unwritten tradition, were the chief reasons why the development of their system differed from the development of ours" (Maine, ch. i.).

(2) The historical development of institutions has been in an opposite direction in Rome and England. At Rome it was from more free to less free, in England from less free to more free. The *lex regia*, the law of *majestas*, the ultimate vesting of complete despotic authority in the person of the emperor, were the results of the Roman system; the English system is illustrated by the Act of Edward VI. (1 Edw. VI. c. 12) repealing 31 Hen. VIII. c. 8, by which the king's proclamations had the force of Acts of Parliament, the Habeas Corpus

Act, the Bill of Rights, and the provision in the Act of Union of 1801, limiting the prerogative of the Crown in the creation of Irish peers.

(3) The difference in the conception of family relations accounts for the existence of institutions which have no counterpart in England, such as slavery, agnation, adoption, *patria potestas*, marriage by *usus*.

(4) The Romans had not arrived, in the time of Justinian, at anything more than the most rudimentary conception of representative government. Hence the whole law of elections to Parliament, municipal councils, boards of guardians, etc., is of modern growth.

(5) The difference in tenure of land of course leads to great divergences. English law knows nothing of *ager publicus* or *emphyteusis*, Roman law of distress or the rule against perpetuities.

(6) Roman law was the universal law of the civilized world. Hence the growth of international law, or the law regulating the relations of independent states *inter se*, belongs to a later date, though no doubt founded to a large extent upon Roman principles.

(7) The development of manufacture and commerce has caused certain branches of law to assume an importance which did not belong to them in Roman law. It is sufficient to refer to the subjects of merchant shipping, railways, agency, joint-stock companies, negotiable instruments, patents, and copyrights to illustrate this.

(8) The fundamental difference between real and personal property was practically unknown to Roman law. That law treated the two kinds of property as far as possible in the same manner.

(9) The power of the early Christian bishops led to a great extension of the jurisdiction of Roman ecclesiastical courts. In contrast with the continual prohibitions issued by English common law courts to the ecclesiastical courts may be set the title of Cod. i. 4, 7, *De his qui ex consensu litigant apud episcopum.*

(10) The English jury system, criminal law, and rules of evidence, though possibly to some extent affected by Roman law, are in the main independent of it.

Some of the Roman technical terms have been adopted by English law, but in a sense which they did not bear in Roman law. Examples are *damnosa hereditas*, used in English law of any property which is rather a benefit than a burden, as the unavailable estate of a bankrupt (*Ex parte Allen*, 20 Ch. D. 346), *restitutio in integrum* (Bk. III. Tit. XI.), *bona fides* (Bk. II. Tit. VI. 1), *judex* (Bk. IV. Tit. XVII.), *nudum pactum* (Bk. III. Tit. XIII.), *stipulatio* (Bk. III. Tit. XV.), *res judicata* (Bk. IV. Tit. XIII. 5), *curator* (Bk. I. Tit. XIII.), *creditor* (Bk. III. Tit. XIV. 4).

# THE INSTITUTES OF JUSTINIAN

## ILLUSTRATED BY ENGLISH LAW.

## BOOK I.

### Tit. I.

*Pr.* The definition of *justitia*, which stands at the head of the Institutes, would scarcely be accepted by modern jurists. The Roman jurists had not arrived at the conception of a distinction between positive law and positive morality. This definition cannot be understood without a reference to the Stoic philosophy (see Sandars, Introd. s. 14; Maine, ch. iii.; Hunter, xxxix.). A modern English institutional treatise upon law would scarcely contain a definition of justice. Such a definition falls rather within the province of morality. "Just or unjust, justice or injustice, is a term of relative and varying import. . . . By the epithet 'just,' we mean that a given object to which we apply the epithet accords with a given law to which we refer it as a test" (Austin, lect. vi.). In Mill's Utilitarianism, justice is defined as "the animal desire to repel or retaliate a hurt or damage to one's self or to those with whom one sympathizes, widened so as to include all

persons, by the human capacity of enlarged sympathy and the human conception of intelligent self-interest" (p. 79).

*Justitia* is used in a concrete sense in English law, a use foreign to the Roman term. In old statutes and charters, *e.g.* the Constitutions of Clarendon, A.D. 1164, the term *justitia regis* is used as equivalent to *justitiarius regis*. The use still exists, and the title of "justice" as applied to a judge is recognized by statute, Jud. Act, 1877, s. 4.

1. The definition of *jurisprudentia* is vicious, according to modern views, for the same reason as the definition of *justitia*. It was conceived of as a branch of philosophy (Holland, 3). "To know what is meant by jurisprudence we must know, for example, what is meant by a book of jurisprudence. A book of jurisprudence can have but one or other of two objects: (1) To ascertain what the law is; (2) to ascertain what it ought to be. In the former case it may be styled a book of expository jurisprudence; in the latter, a book of censorial jurisprudence" (Bentham's Works (edit. 1843), vol. i. p. 148). "The science of jurisprudence is concerned with positive laws, or with laws strictly so called, as considered without regard to their goodness or badness" (Austin, 176). It is defined by Professor Holland as "the formal science of positive law" (Holland, 11).

4. Law is divided by Professor Holland, following the division in the text to a certain extent, into *private*, or that regulating the relations between subject and subject; *public*, or that regulating the relations between state and subject; and *international*, or that regulating the relations between state and state (Holland, 110). The third branch of the division can scarcely be regarded as law in the fullest sense, as the sanction is

moral rather than legal (see Austin, lect. v.; Holland, 291), so that the division remains practically very much as it was left in the Institutes. The division of law into public and private is not, however, admitted by all English writers (see, for instance, Austin, lect. xvii.; Markby, s. 146). Further, international law is itself often again divided into *public* and *private* (the latter often called *comity*), as by Sir R. Phillimore.

It is perhaps the simplest plan to say that a definite political superior at once implies determinate relations between (1) the political superior and his subjects, *constitutional law;* (2) the subjects *inter se*, *municipal law;* (3) the subjects of different political superiors, *intermunicipal law;* (4) the political superiors *inter se*, *international law.* The term "intermunicipal" was suggested by Mr. Frederic Harrison in an article in the *Fortnightly Review* for November, 1879.

If law be used in its widest sense, including moral as well as legal sanctions, Lord Mackenzie's division may be used. It is obviously based upon the Roman law. The division is: (1) divine positive law; (2) natural law; (3) positive law of independent states; (4) law of nations (Mackenzie, prelim. chap.).

## Tit. II.

*Pr.* No modern definition of law would be sufficiently wide to include all animals. This title is to be explained in the same manner as the last, by keeping in view the Stoic theory of the law of nature. See Holland, 30, who defines the law of nature as "that portion of morality which supplies the more important

and universal rules for the governance of the outward acts of mankind" (26).

1. The Roman division of *jus* into *naturale*, *gentium*, and *civile* no doubt suggested to Austin his division of jurisprudence into *general* and *particular*. See on this division of Austin's, Holland, 8: and on the law of nature, Mackenzie, prelim. chap.; Holland, 26. It may be remarked that the threefold division is not always adhered to, even in the Institutes themselves. See Bk. II. Tit. I. 11, where *jus gentium* is identified with *jus naturale*.

It is scarcely necessary to observe that the phrase *civil law* in England is not applied to the municipal law of England, but to that law, founded on the Roman, which is used in the Admiralty and Ecclesiastical Courts (see the Introd. to Stephen). The *jus naturale* and *jus gentium* of Roman law were (with the exception of slavery, which was *jure gentium*, but not *jure naturali*) co-extensive (Hunter, xxxix.; see an article on Ancient International Law by H. B. Leech, *Contemporary Review*, Feb., 1883). Blackstone distinguishes them in his Introd., but the distinction is not of much importance (see 1 Stephen, 21, 24). Austin (lect. xxxii.) rejects the division of law into positive and natural as useless, and as embracing positive morality as well as positive law. The phrase *jus gentium*, or law of nations, has been frequently adopted by English judges, as by Lord Stowell in *The Aquila*, 1 C. Rob. 279, "Salvage is a question of the *jus gentium;*" and by Sir C. Cresswell in *Simonin* v. *Mallac*, 2 S. & T. 67, "If there be any such right, it must be found in the law of nations, that law to which all nations have consented, or to which they must be presumed to consent, for the common benefit and advantage." The use of the term "law of nature"

is by no means uncommon in text-books and decisions. Thus, Hale says that the law of nature makes a man his own protector (1 Hale, P. C. 51.) *Lex naturæ* is one of the laws within the realm of England (Co. Litt., 11 b). The law of nature is the basis of the argument in *Sharington* v. *Strotton*, Plowd. 298, as long ago as 1564. In *Forbes* v. *Cochrane*, 2 B. & C. 471, Best, J., says, "The proceedings in our courts are founded upon the law of England, and that law is again founded upon the law of nature and the revealed law of God."

2. *Servus* is identified by Lord Coke with the English villein (Co. Litt., 116 a). Villenage was, however, a tenure and not a *status*, as a freeman might hold in villenage (Bracton, 26 a). The nearest approach to the Roman *servus* would be the villein in gross (Co. Litt., 116 a). Villenage has been long extinct, the last mention of it in the reports being in 1618 (*Pigg* v. *Caley*, Noy, 27).

The view of slavery taken by modern English law is to be found in the judgment of Lord Mansfield in *Somersett's Case*, 20 State Trials, I, Broom's Constitutional Law: "The state of slavery is of such a nature that it is incapable of being introduced on any reasons, moral or political, but only by positive law. . . . It is so odious that nothing can be suffered to support it but positive law." English courts will recognize the status of slavery in a foreign country, if allowed by the law of that country. A contract for the sale of slaves in Brazil made between an English vendor and a Brazilian purchaser was held to be valid (*Santos* v. *Illidge*, 8 C. B. N. S. 861).

3. "The municipal law of England . . . may, with sufficient propriety, be divided into two kinds: the *lex non scripta*, the unwritten (or common) law; and the *lex scripta*, the written (or statute) law" (1 Stephen, Introd., s. iii.). Although Blackstone here adopts the

Roman terms, they bear a very different meaning. To the Roman lawyer all that was written was *jus scriptum*, but in Blackstone the reported decisions of the courts and such parts of the civil and canon law as the courts adopt are regarded as unwritten (see Stephen, *ubi supra*; Austin, lect. xxviii.; Maine, ch. i.). In the theory of English law, the *edicta magistratuum* and *responsa prudentium* would not fall within the domain of written law. Royal proclamations would be probably considered as written law if authorized by statute. In Blackstone's eyes all judiciary, as distinguished from statute, law was unwritten.

Austin divides laws in respect of their sources into laws made directly and immediately by the supreme legislature, and laws not so made, though they derive their validity from its express or tacit authority. The latter would include (1) laws made by colonial assemblies; (2) bye-laws made by corporate bodies; (3) laws made in the way of direct legislation by courts of justice; (4) judicial decisions; (5) autonomic laws (Austin, lect. xxviii.).

Other classifications of the sources of law are: (1) legislation, (2) judicial decision, (3) commentaries, (4) custom (Markby, s. 20); (1) custom, (2) religion, (3) adjudication, (4) science, (5) equity, (6) legislation (Holland, 45).

The sources of *English* law, according to Blackstone, following Co. Litt., 115 b, are the unwritten or common law, of three kinds—(1) general customs; (2) particular customs; (3) certain particular laws adopted and used by some particular courts; and the written or statute law (1 Stephen, Introd., s. iii.).

6. The *lex regia* is opposed to the English theory of the royal prerogative. In England *lex facit regem* (Bracton, 5 b; see 2 Stephen, bk. iv. pt. i. ch. vi.). By

31 Hen. VIII. c. 8, it was enacted that the king's proclamations should have the force of Acts of Parliament, but this was repealed by 1 Edw. VI. c. 12. Proclamations have a binding force only when they are grounded upon and enforce the laws of the realm (3 Inst. 162).

Personal and general constitutions may be compared with private and public Acts of Parliament. Formerly the courts did not take judicial notice of private Acts, but now, by 13 & 14 Vict. c. 21, every statute is to be taken to be a public one, and judicially noticed as such, unless the contrary be therein expressly declared. The four classes of Acts of Parliament are: (1) public general Acts; (2) public local and personal Acts; (3) private Acts printed by the Queen's printer; (4) private Acts not printed by the Queen's printer.

7. The *jus honorarium* has been frequently compared with English equity (see Reeves' History of English Law, Introd. by Finlason; Maine, ch. iii.; 1 Spence, 419, etc.). Gilbert's Lex Prætoria is a treatise on English equity. Among other differences between the prætor's court at Rome and an English court of equity are these:—

(1) At Rome the *jus civile* and *jus honorarium* were administered by the same court. In England (until the Judicature Acts) the Court of Chancery was practically the only court of equity, the other equitable jurisdictions (such as that of the Exchequer) having become obsolete, while common law cases went before the Common Law Courts. (2) The prætor was originally an officer of the Republic, the Chancellor a delegate of the Crown. (3) The prætor was an annual officer; the Chancellors up to the Act of Settlement held office *durante bene placito*, since that date *quamdiu se bene gesserint*. (4) As long as the *judicia ordinaria* lasted, the prætor referred the case to a *judex* or *recuperatores*.

In Chancery a jury was seldom used before the Judicature Acts, though authorized by 21 & 22 Vict. c. 27. Since those Acts a trial by judge and jury cannot take place in the Chancery Division (*Warner* v. *Murdoch*, 4 Ch. D. 250); but where the case is a proper one for a jury, it should be transferred to the Queen's Bench Division (*Re Martin*, 20 Ch. D. 365). (5) The prætor *peregrinus* had originally sole jurisdiction when an alien was a party. The Court of Chancery in England never had such exclusive jurisdiction. (6) The prætor was at first an unprofessional judge, but the Chancellor seems to have always been an ecclesiastic or lawyer. (7) The *edictum* of the prætor was at first part of the *jus consuetudinis* (Cicero, De Invent., ii. 22). A decision of the English Chancellor, though it might declare the validity of a custom, could scarcely have been included in customary law. At a later period the *edictum* became part of the *jus scriptum*, and here again English law differs, for the decision of a judge is unwritten law (see note to par. 3).

There is nothing in English law corresponding to the authority of *responsa prudentium*. There are certain text-books, the authority of which is recognized by the courts, but as a rule they are the works either of lawyers who have reached the judicial bench, such as Coke, Blackstone, Sir R. Phillimore, etc., or works which have obtained authority by lapse of time and their intrinsic merits, *e.g.* Hawkins' Pleas of the Crown, Fearne's Contingent Remainders. These works may be regarded as evidence of what Lord Coke calls *communis opinio jurisprudentum* (Co. Litt., 11 a), and so would approach most nearly to *responsa prudentium*. The opinion of no text-writer, however eminent, would be sufficient in England to outweigh the authority of a judicial decision, or, in Roman

phraseology, *responsa* never become *sententiæ receptæ*. There is one branch of law, viz. international law, where, from the nature of the case, the authority of text-writers is greater than in other branches. The consent of jurists is regarded as evidence of the usage of nations. The value of the opinion of jurists upon questions of international law is examined at length in the judgments of Sir R. Phillimore and Brett, L.J., in *Reg.* v. *Keyn*, 2 Ex. D. 63.

9. Austin (lects. xxix., xxx.) treats customary law as a branch of judiciary law, not of binding authority till recognized by a competent court. Others (as Holland, 45; Markby, s. 65) treat customary law as an independent source. "Custom," says the writer last cited, "is a notion older than law itself." It may perhaps be safe to say that custom is a source of law, whether an independent source or not depends upon the view adopted as to the period at which the custom becomes a part of the body of law recognized by the State. Sometimes a custom is recognized by legislation, as in the Landlord and Tenant (Ireland) Act, 1870 (33 & 34 Vict. c. 46), by which legislative authority was given to the Ulster custom.

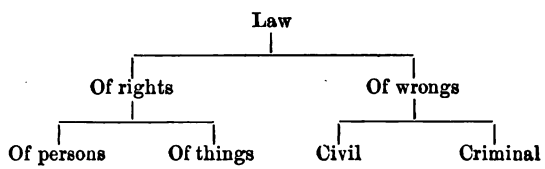
11. Abrogation of laws by tacit consent or desuetude is unknown to English law. By the Scotch judges it has been held that Acts of the Scottish Parliament passed before 1707 may become ineffectual by practice contrary to the Acts without express repeal. In England, a statute must be formally repealed by another; many practically obsolete acts have been repealed by Statute Law Revision Acts passed at various times, the latest of which is 44 & 45 Vict. c. 59. In certain cases the courts have refused to follow previous decisions which they have considered at variance with authority or principle. An example of this is seen in *Reg.* v. *Scaife*,

17 Q. B. 238, in which a new trial was granted in a case of felony. The case has always been disapproved, and not followed. "It took no root in our jurisprudence," says Lord Coleridge in *Reg.* v. *Duncan*, 7 Q. B. D. 198.

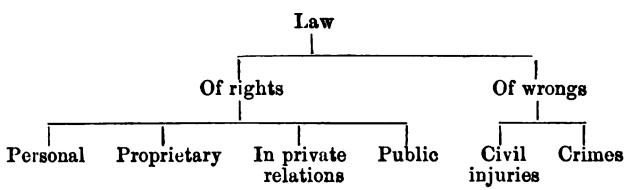
## Tit. III.

*Pr.* This division of the objects of law has not been adopted by any English writer. It is criticised, *inter alios*, by Austin (lect. xliii.) and by Hunter (xxxiii.). It is a co-ordination of substantive (to use Bentham's terms) and adjective law, of the principles of law and procedure.

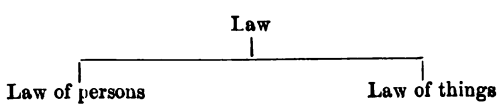
Blackstone's division is—




Stephen's division is—




Austin's division is—



And see *ante*, note on Tit. II. 1. The number of possible divisions will always be as great as the number of possible principles of division.

For slavery see note on Tit. II. 2. Austin divides the law of persons into the law regarding private, political, and anomalous conditions (1 Austin, 79). The Roman division adopted in this section is not likely to be found in an English writer, owing to the small importance of slavery in English law.

1. Political or civil liberty is defined by Blackstone (2 Stephen, bk. iv. pt. i. ch. vi.) and by Austin (lect. vi.) in much the same terms as those used in this section.

## Tit. VIII.

As the *potestas*, whether *patria* or *dominica*, has no counterpart in English law, it is impossible to compare the Roman and English law in this matter, except so far as to say that certain persons (such as the slave, the son, the ward, the lunatic) were subject to disability by Roman law, and that certain persons (such as the wife, the infant, the ward, the lunatic) are subject to disability in English law. English law tends towards imposing disabilities as little as possible. Hence the importance of the distinction between those who are *sui juris* and those who are *alieni juris* is less in English than in Roman law. Instances of this tendency may be found in the Married Women's Property Acts, 1870, 1874, and 1882, and in the case of *Molton* v. *Camroux*, 4 Ex. 17, where it was held that contracts entered into with a lunatic fairly and *bonâ fide* by a person ignorant of his condition, where the transaction is in the ordinary course and is wholly or in part executed, are valid.

## Tit. IX.

*Pr.* The rights of the father over an infant child's person and property seem to be confined in England to (1) lawful correction; (2) custody of the person; (3) control of the child's education and religion (see *Re Agar-Ellis*, 10 Ch. D. 49); (4) power of withholding consent to marriage (4 Geo. IV. c. 76, ss. 16–18); (5) enjoyment of the infant's property, subject to account on the infant's coming of age; (6) power of appointing a testamentary guardian by 12 Car. II. c. 24. Even this limited authority is determined in most, if not in all, cases by the infant's marriage (2 Stephen, bk. iii. ch. iii.). By English law the father seems to have no right to his child's earnings, though it is otherwise by American law (Simpson, ch. x. s. 1). See further notes on Tit. XXI. and on Bk. II. Tit. IX.

The case of an illegitimate child is different. Its maintenance up to the age of sixteen is provided for by 4 & 5 Will. IV. c. 76. Up to that age it is part of the mother's family, and she (or her husband if she have married) must maintain it. But on arrival of the child at the age of sixteen, all legal obligation towards it on the part of the mother or her husband ceases (*Salford Union* v. *Overseers of Manchester*, 10 Q. B. D. 172).

1. Marriage by Roman law was, except in the ancient form, called *confarreatio*, a civil contract, even though it was *divini et humani juris communicatio* (Dig. xxiii. 2, 1); it could be entered into in some cases *inter absentes* (Dig. xxiii. 2, 5, 6). By the law of England, at any rate from the date of the Council of Trent up to 1836, it was not entirely a civil contract, but partook of the nature of both a contract and a ceremony of the

Church, and the presence of a priest in orders was essential to its validity (*Reg.* v. *Millis*, 10 C. & F. 534). Since the Marriage Act of 1836 (6 & 7 Will. IV. c. 85) the religious ceremony can be dispensed with, if the parties comply with the formalities of the Act.

2. The *patria potestas* of Roman law as respects the marriage of children was abolished by the canon law, which is the law by which marriages are governed in this country, except so far as it has been restricted by the Marriage Acts (*Sherwood* v. *Ray*, 1 Moo. P. C. 353).

## Tit. X.

*Pr.* The age of puberty is fixed by Tit. XXII. at fourteen in the male, and twelve in the female. English law follows the Roman law here (2 Stephen, bk. iii. ch. iii.), except that even without the consent of the parent or guardian the marriage is not void (*R.* v. *Birmingham*, 8 B. & C. 29).

By 4 Geo. IV. c. 76, s. 17, provision is made for the case where the person whose consent is required to the marriage is *non compos*. The remedy is by petition to the Lord Chancellor.

1–12. The marriages here prohibited would all be void by English law, with the exception of those between relatives by adoption (see Tit. XI.) and the cases in par. 9. The marriage of first cousins is allowed both by the civil and Levitical law (the latter of which it is that the law of England follows (2 Stephen, bk. iii. ch. ii.) ), but forbidden by the canon law. Affinity is of the same importance as consanguinity in both Roman and English law.

9. The English law of divorce differs from the

Roman in these main points, besides others of less importance:—

(1) In England, divorce can only be granted by the special court constituted by the Divorce Act, 1857 (20 & 21 Vict. c. 85).

(2) English law recognizes a kind of modified divorce, known as judicial separation.

(3) A divorce can only be granted for specified reasons in England; mutual consent in Rome was sufficient until the promulgation of Nov. 117.

(4) In Rome the adulterer could not marry the accomplice after divorce (Nov. 134); in England there is no such rule, but by the Divorce Act above, s. 57, a clergyman may refuse to celebrate the remarriage of a guilty party.

In England, an action for breach of promise of marriage has always lain from very early times; in Rome, *sponsalia* entered into by affianced persons could be repudiated at will, subject no doubt to return of twice the *arra* (if any *arra* had been given) by the person in fault (see Bk. III. Tit. XXIII.). As the position of *sponsus* or *sponsa* gave rise to no legal obligation, the restrictions in the text were only matter of *boni mores*. It is scarcely necessary to say that there is no such restriction in English law. (For *sponsalia* see Hunter, 516.)

11. Thus marriage was not permitted between guardian and ward (unless betrothed with the father's sanction), governor of province and native of province, adulterer and accomplice, Jew and Christian (Sandars, *ad loc.*). In none of these cases is marriage forbidden in England. Marriage of a ward in Chancery without the sanction of the court is good, though the person marrying the ward is punishable for contempt of court.

12. For *dos* see Bk. II. Tit. VIII.

13. In Rome, the offspring of a *concubinatus* (a position recognized by law till abolished by Leo the Philosopher in 887) might be legitimated by the subsequent marriage of their parents. The cohabitation must, however, have been between parties to whose marriage there was no legal obstacle. This has never been the law of England, and an attempt to make it so led to the famous protest of the barons at the Parliament of Merton, "*quod nolunt leges Angliæ mutare quæ huc usque usitatæ sunt et approbatæ*" (20 Hen. III. c. 9; Bracton, 416 b). Although the law of England in theory recognizes nothing but *nullius filius* in the bastard, even if his parents afterwards marry, there are three cases in which his rights as a son are to a certain extent recognized: (1) the prohibitions as to disability by consanguinity apply on obvious moral grounds though one of the parties be illegitimate (Bac. Abr. Marriage, A); (2) when a man has a bastard son and afterwards marries the mother, and by her has a legitimate son, if the bastard (*bastard eigné*) enters upon his land and dies seised thereof, whereby the inheritance descends to his issue, the legitimate son (*mulier puisné*) and all other heirs are barred of their right (Litt. 399). The rule is the same as to coparceners when the elder sister is a bastard and they both enter peaceably (Co. Litt. 244 a). (3) Natural children have a limited right to support from the mother or the putative father, but in the latter case only after bastardy proceedings have been taken before justices of the peace. By Roman law, children of a recognized *concubinatus* had a right to be supported by the father without any preliminary judicial proceedings (Nov. 89). Persons legitimate by the law of a country which allows *legitimatio per subsequens matrimonium*, but illegitimate by English law, are legitimate for the

purpose of inheriting personal property in England (*Re Goodman's Trusts*, 17 Ch. D. 266), but not real property (*Doe* v. *Vardill*, 2 C. & F. 571; 7 C. & F. 895). Of course an illegitimate son may be legitimated by Act of Parliament even for the purposes of succession to real property in England, as was done in the case of the natural children of John of Gaunt (2 Stephen, bk. iii. ch. iii.; bk. iv. pt. i. ch. iii.); so in Rome the offspring of *concubinatus* might be legitimated by imperial rescript (Nov. 74).

## Tit. XI.

Adoption in England is not recognized as making any legal difference in the position of the adopter or of the person adopted. No relationship is created as in Roman law (see Tit. X.), and there are no restrictions as to age or sex corresponding to the restrictions in pars. 4, 10.

## Tit. XII.

1. *Deportatio* may be compared with the transportation which formerly existed in English law. Transportation was abolished as a punishment by 20 & 21 Vict. c. 3, and penal servitude substituted. The Roman *deportatus* lost his rights as a citizen, the prisoner under sentence of penal servitude only has his civil and political rights suspended during the sentence. He cannot retain any office under the Crown, public employment, ecclesiastical benefice, etc., or any pension,

nor can he be elected or sit or vote as a member of either House of Parliament, or exercise any right of suffrage or other parliamentary or municipal franchise. His property during the sentence is committed to the custody of administrators or interim curators (33 & 34 Vict. c. 23). On the expiration of the sentence or pardon his rights revive.

5. *Jus postliminii* in English law is used in three senses, all differing from, though based upon, the use in the text. The term is confined to international law, and signifies—

(1) With regard to dominion of states, the right of being reinstated in property and rights which have been accidentally lost or illegally taken away (1 Phillimore, pt. iii. ch. xvi.).

(2) With regard to private property, whether movable or immovable, whether booty on land or prize at sea, captured in war, the right of the original proprietor to a revesting of his property if recaptured by his countrymen before the enemy have held it for twenty-four hours (3 Phillimore, pt. x. ch. vi.; 2 Twiss, 340).

(3) With regard to prisoners, the right in a similar case of restoration to their original position without being considered prisoners of war (Phillimore, *ubi supra*).

6. Emancipation in English law is a technical term confined to the poor-law. Where children reside with their parents, they are said to be unemancipated, whether they be infants or of full age, unless they be married, or have acquired a settlement in their own right (*R.* v. *Roach*, 6 T. R. 247).

## Tit. XIII.

*Pr.* The English guardian corresponds to some extent to both the *tutor* and the *curator*. The term *curator* is an English legal term, but only for the person to whom the interest of a convicted felon in his property in some cases passes (33 & 34 Vict. c. 23).

English law recognizes no less than eight varieties of guardianship: (1) by nature; (2) by nurture; (3) in socage; (4) by statute; (5) by election; (6) by appointment of the Chancery Division; (7) *ad litem;* (8) by custom; (2 Stephen, bk. iii. ch. iv.; *Eyre* v. *Countess of Shaftesbury*, 2 White and Tudor, L. C.). It is obvious that it is impossible to find parallels to these varieties in the varieties of *tutela* or *curatela*, but such comparison as is possible will be attempted in the subsequent notes. Guardianship was originally at Rome, both in the case of women and male children, an extension of the *patria potestas;* and in the case of the latter, "a contrivance for keeping alive the semblance of subordination to the family of the parent up to the time when the child was supposed capable of becoming a parent himself" (Maine, ch. v.). English guardianship proceeds only upon the principle of protection to the immaturity of youth, both bodily and mental (*ibid.*). This difference in the conception of guardianship in the two systems may help to account for some of the differences in the law.

On the other hand, *pupillus* does not fully correspond to the infant of English law, nor yet does the *infans*, for *infans* was a child under the age of seven years (Sandars on Bk. III. Tit. XIX.). Up to the age of seven, the *infans* and infant did no doubt to a certain extent correspond; after that age, however, the com-

parison must be between the infant and *pupillus*, a comparison all the more difficult to make, as the Roman law recognized two ages of capacity, while English law recognizes only one, except for the purposes of marriage (see Tit. X.) and criminal responsibility (4 Stephen, bk. vi. ch. ii.). See further the notes to Tit. XXI.

The guardian in English law is, like the father (see note on Tit. IX.), usually entitled to the custody of the infant's person (Macpherson, 119). It is usual to appoint the same person to be guardian of the estate as of the person of the infant, but this rule is sometimes departed from (2 Daniell, ch. xxix. s. 5 (1)). Compare the Roman theory that a *tutor* was given to the person, a *curator* to the property (Sandars, *ad loc.*).

3. *Tutela testamentaria* may be compared with guardianship by statute. Both kinds supersede all others (*semper legitima tutela testamentariæ cedit*, Dig. xxvii. 3, 9, 1; 12 Car. II. c. 24), except those appointed judicially (see Tit. XX.). By the Act of Charles II. a father may by deed or will dispose of the custody of such of his children as are infants or unmarried at the time of his death, or born posthumously, to any person he pleases, such guardian to have the custody of the person and property of his ward, and such appointment to be good against all persons claiming as guardian in socage or otherwise. Note that (1) the power can only be exercised by the father; (2) it may be exercised by deed as well as by will; (3) it applies to children up to the age of twenty-one, or for any less time; (4) it needs no judicial confirmation (see par. 5 of this Title); in all these cases differing from Roman *tutela testamentaria*.

4. In Roman law *postumus* meant a child born either after the date of the will, or after the death of the testator (Poste on Gaius, i. 147). In England, the

word "posthumous" is used only for a child born after the death of the father. Posthumous children (or children *en ventre sa mère*, to use the technical term) are considered as living at the death of the father (10 & 11 Will. III. c. 16; *Blackburn* v. *Stables*, 2 V. & B. 367; 1 Spence, 617).

## Tit. XIV.

4. Guardians in England may be appointed temporarily, as guardians *ad litem*, or guardians for the purpose of consenting to the marriage of any infant having no father or unmarried mother, or other guardian (4 Geo. IV. c. 76, ss. 16, 17).

## Tit. XV.

Agnatic relationship is unknown to English law at the present day; one trace of it may, perhaps, be discerned in the old rule as to the exclusion of the half-blood in succession to real estate (Maine, ch. v.). But since 3 & 4 Will. IV. c. 106, s. 9, the half-blood now ranks next to the whole blood in succession. In succession to personal estate the whole and half blood are on the same footing (Williams, P. P., pt. iv. ch. iv.). Another trace perhaps exists in the preference of relatives *ex parte paternâ* to those *ex parte maternâ* in succession to real estate, a rule which Blackstone compares with the succession of *agnati* (1 Stephen, bk. ii. pt. i. ch. xi.). The Roman doctrine of agnation has been sometimes referred to in English decisions, *e.g. Boys* v. *Bradley*, 22 L. J. Ch. 617, where

the question at issue was the construction of a testamentary gift to "the nearest of kin to myself in the male line in preference to the female line."

The *agnatorum tutela* may be compared roughly with the guardianship by nature and guardianship in socage of English law. It will not, however, be safe to carry the comparison very far, for the guardianship by nature belongs only to the father, and applies only to the heir apparent or heiress presumptive; and the guardianship in socage, though possibly applying to personalty, can only devolve upon the next of blood of the ward to whom the inheritance cannot descend (2 Stephen, bk. iii. ch. iv.).

## Tit. XVI.

There is nothing in English law corresponding to *capitis deminutio.* Outlawry would be much too strong a term to represent *minima capitis deminutio,* as it always arose from crime or contumacy, and there is no other English term which approaches the meaning of *capitis deminutio.* Outlawry is now of little importance in English law since its abolition in civil proceedings by 42 & 43 Vict. c. 59. For outlawry in criminal cases see 4 Stephen, bk. vi. ch. xix.

The word "capital" in English law has a meaning differing from that which it bore in Roman law. *Capitalis pœna* was one which affected the *caput,* and involved forfeiture of the right of citizenship (Dig. xlviii. 19, 2). It included crimes not capital in the English sense, such as *deportatio* and condemnation to the mines (Bk. IV. Tit. XVIII. 2). The term "capital punishment" has been adopted by the legislature in the Capital

Punishment Amendment Act, 1868 (31 & 32 Vict. c. 24). Formerly, if a statute made any new offence felony, the law implied that it should be punished with death (1 Russell on Crimes, ch. iv.); but this is no longer the case.

The English term applies to the crime as well as the punishment. Thus "capital treason" is used by Shakespeare in King Lear, act v. sc. 3; Richard II., act iv. sc. 1.

## Tit. XVIII.

The *legitima parentium tutela* resembles the guardianship for nurture in that it applies only till the child reaches the age of puberty, but (1) the latter applies to females as well as males up to the age of 14, while *tutela* ceased for females at twelve; (2) it devolves upon the mother if she survive the father (2 Stephen, bk. iii. ch. iv.); (3) it applies to illegitimate children (*Reg.* v. *Nash*, 10 Q. B. D. 454). Note that guardianship by nature and for nurture extend to the person only (*ibid.*), and so correspond to *tutela*, which was given only to the person (Sandars on Tit. XIII.).

## Tit. XIX.

*Tutores fiduciarii* were so called, not because their office implied a trust (in the English sense of the word), but because the *tutor* was bound by a trust to the father (Sandars, *ad loc.*). In early times guardianships in socage and by custom were in the nature of a trust

(1 Spence, 606), and a testamentary guardian is still a trustee (*Sleeman* v. *Wilson*, L. R. 13 Eq. 36), and so apparently is a guardian appointed by the court (Lewin, 256).

## Tit. XX.

4. It seems probable that the jurisdiction of the Chancery Division of the High Court of Justice over infants is directly derived from the prætor's jurisdiction. The jurisdiction is exercised in a summary way, formerly on petition, and now by summons, without requiring an action to be brought (2 Daniell, ch. xxix. s. 5 (1)). The court does not itself become the guardian, but secures the due execution of the duty of guardianship. It will interfere to remove a testamentary guardian, and may appoint a guardian even in the lifetime of the father. The guardian so appointed is guardian both of the property and person, but, as a general rule, the court will not act where there is no property (Daniell, *ubi supra*). The prætorian *tutor*—generally called *tutor dativus*, though the term *dativus* is used by Gaius in a different sense (Gaius, i. 154)—had still greater authority in cases of necessity even over testamentary *tutores* (Tit. XXVI. 1), inasmuch as the possession of property by the *pupillus* was not necessary in order to found the jurisdiction over the *tutor*. By 36 Vict. c. 12, the court may grant the custody of infants up to the age of sixteen to the mother.

7. The person appointed guardian of the estate must ordinarily give security duly to account. After the guardian's duty is at an end, the accounts must be duly passed (Daniell, l, *ubi supra*). As between a testamentary

guardian and his ward, since the former is a trustee, the Statute of Limitations is not applicable to accounts (*Matthews* v. *Brise*, 14 Beav. 341).

## Tit. XXI.

*Pr.* The rule as to *contracts* by infants is not quite the same. By English law all contracts which the court can pronounce to be for the infant's benefit are valid, all those which it can pronounce to be to his prejudice are void, and those which do not fall distinctly under either predicament are voidable at his election (2 Stephen, bk. iii. ch. iv.). This rule must, however, be now read subject to the provisions of 37 & 38 Vict. c. 62, by which all contracts made by infants for the repayment of money lent, for goods supplied, and all accounts stated with infants (except for necessaries), are void, in spite of any ratification after the infant comes of age. This includes a contract to marry (*Coxhead* v. *Mullis*, 3 C. P. D. 439). An infant cannot be made bankrupt, though he may be so adjudged after twenty-one upon a debt contracted during infancy (*Ex parte Lynch*, 2 Ch. D. 227). As to a contract for the infant's labour, the question whether it is inequitable depends upon whether it was at the time of the agreement common as a labour contract, or was in the then state of trade such as a master was reasonably justified in imposing as a protection to himself, and also whether the wages were a fair compensation for the infants' services (*Leslie* v. *Fitzpatrick*, 3 Q. B. D. 229). An infant can make a valid gift (*Taylor* v. *Johnston*, 19 Ch. D. 603). (For other instances of infants' privileges and disabilities, see Stephen, *ubi*

*supra*, and note on Bk. II. Tit. IX. 1.) All these contracts, if made with the authority of the *tutor*, would, in Roman law, have bound the *pupillus;* but in English law contracts made with the authority of the guardian would not bind the infant (unless for necessaries), though in some cases the guardian might be personally liable. In one or two matters, statute law confers special powers upon the infant beyond those to which he is entitled at common law. Thus, by 18 & 19 Vict. c. 43, a male of twenty or a female of seventeen may make a valid marriage settlement with the sanction of the court; by 9 & 10 Vict. c. 95, s. 64, an infant may maintain an action in the county court for wages or piece-work as though he were of full age.

As to *torts*, the infant is generally liable, as in *Burnard* v. *Haggis*, 14 C. B. N. S. 45; and so in crime, for the maxim of law is *malitia supplet ætatem.* The chief exceptions are: (1) an infant under seven years of age cannot be guilty of felony; (2) an infant under fourteen cannot be guilty of rape; (3) an infant is privileged in certain cases of omission, as non-repair of a bridge or highway (4 Stephen, bk. vi. ch. ii.).

An infant sues by his next friend, and defends by his guardian (see Jud. Act, 1875, Ord. xiii. r. 1; Ord. xvi. r. 8), except in cases of tort, where he defends in his own name, as in *Burnard* v. *Haggis* (above). In Roman law, in both contract and tort, the *tutor* acted alone and appeared in actions in his own name when the *pupillus* was under seven years of age; above that age, the intervention of the *tutor* was necessary only as a consenting party. In such cases the *tutor* appears to have had the option either of acting alone for the *pupillus*, or of giving his consent to transactions entered into by the *pupillus* (Mackenzie, pt. i. ch. x.). English law allows any person to commence proceedings on behalf

of an infant as next friend, subject to incurring the censure of the court and liability to costs, if the proceedings were improperly instituted (2 Daniell, ch. xxix. s. 5 (1)); but Roman law allowed no such general right to any one to act as *tutor*.

The rule at the end of the introductory paragraph (*si tutoris auctoritas non interveniat*, etc.) is the same in English law. The person contracting with the infant is bound, whatever may be the infant's position (*Holt* v. *Ward*, 2 Str. 937).

There seems to be no distinction made by Roman law, as there is by English law, between the procedure in contract and that in tort. Apparently the *auctoritas* of the *tutor* would be as necessary for the defence of an action of tort as for the institution of an action of contract.

2. Adoption of an infant's contract by his guardian may serve to charge the guardian, but cannot charge the infant. The question is whether the infant had the authority of an agent or not (*Mortimore* v. *Wright*, 6 M. & W. 462). The adoption will be sufficient if it take place even after the contract has been entered into by the infant. *Omnis ratihabitio retrotrahitur et mandato priori æquiparatur* (Co. Litt., 207 a).

3. In England, if an action were to be commenced by the infant against his guardian, it might be brought by any person as next friend (see above), subject to substitution of another person as next friend if the court thought fit (1 Daniell, ch. iii. s. 6). There does not seem, however, to be any precedent of such an action; it is probably in all cases more convenient to take advantage of the summary powers of the court over guardians. See note on Tit. XX. 4. Transactions between guardian and ward are always viewed with jealousy (*Huguenin* v. *Baseley*, 14 Ves. 273).

## Tit. XXII.

English law, as has been said, follows this rule as to the age of capacity for marriage, but no further. See Tit. X.

## Tit. XXIII.

*Pr.* See Tit. XIII. Though guardianship covers more ground than either *tutor* or *curator*, these two together cover more ground both in time and authority than guardianship.

3. Persons of unsound mind, whether idiots or lunatics, are in the custody of the Chancellor, as the general delegate of the Crown as *parens patriæ*. This jurisdiction belongs to the Chancellor personally, and not as a judge of the Chancery Division (Story, 1363). But, by 16 & 17 Vict. c. 70, jurisdiction in lunacy was given to the Lords Justices of Appeal in Chancery, and since the Jud. Acts belongs to the Lords Justices of the Court of Appeal (Jud. Act, 1875, s. 7). Persons of unsound mind sue by a next friend and defend by a guardian or guardian *ad litem* much in the same way as infants; lunatics, to whose estate a committee has been appointed, sue and defend by the committee (1 Daniell, ch. iii. s. 7). An idiot is not a necessary party to any action, as he is presumed to have no understanding (*ibid.*).

Jurisdiction over *prodigi* as such is not assumed by English law, unless the *prodigalitas* be of such a nature as to amount to aberration of mind.

4. Those who are deaf, mute, or subject to any continuous disorder, are not so protected by English law.

## Tit. XXIV.

*Pr.* The rule as to security is the same in England (2 Daniell, ch. xxix. s. 5 (1)).

1. As the guardian appointed by the court is a trustee (see on Tit. XIX.), if there are several guardians they must act in their collective capacity, as the law knows no such distinction as an acting trustee. The act of one done with the sanction and approval of the others would be regarded as the act of all. If any one refuse to join, the court must be applied to, as, except in public trusts, a majority cannot bind a dissenting minority (Lewin, 236). But the custody of the infant's person would be committed to only one of the guardians.

2. For actions against a *judex* see Bk. IV. Tit. V.

## Tit. XXV.

*Pr.* The grounds of exemption named in this title may be divided into: (1) the discharge of some public duty; (2) the being in a position adverse to the ward; (3) incompetence to sustain the burden of the office (Sandars, *ad loc.*). As to (1), no such exemption or disqualification seems to be known to English law. As to (2) and (3), the ground upon which guardians may be removed by the court are: (*a*) infancy, in which case the court would probably appoint some one to act until the infant named as guardian attained his majority (Macpherson, 89); (*b*) lunacy (*id.*, 90); (3) unsuitable religion (*id.*, 115, 123, 124; (*d*) refusal or inability of the guardian (if appointed by the court) to give security (*id.*, 117); (*e*) suspicion of injury to the

infant (*Duke of Beaufort* v. *Berty*, 1 P. Wms. 705); (*f*) misbehaviour (Macpherson, 129); (*g*) poverty or insolvency (as regards a next friend or guardian *ad litem*, *id.*, 355).

11. *Inimicitia* was a matter of more importance in Roman than in English law. Perhaps the only case in English law in which enmity between the parties is of any consequence is that of the constitution of a jury. If a juror can be proved to have expressed himself hostilely to the prisoner, that is a good cause of challenge (*R.* v. *Edmonds*, 4 B. & A. 471). So a dispute pending between the sheriff and one of the parties is good ground for challenge to the array (Co. Litt., 156 a).

16. *Dies continui*, a series of days of any kind; *dies utiles*, days on which legal business could be done. Compare the *dies juridici* and *non juridici* of Co. Litt., 135 a. By the Jud. Act, 1875, Ord. lvii. s. 2, "Where any limited time less than six days from or after any date or event is appointed or allowed for doing any act or taking any proceeding, Sunday, Christmas Day, and Good Friday shall not be reckoned in the computation of such limited time," *i.e.* in Roman language, in any time under six days, only *dies utiles* are reckoned; in other cases, *dies continui*. A similar distinction is often made in charter parties between "working" and "running" days (see an example in *Commercial Steam Ship Co.* v. *Boulton*, L. R. 10 Q. B. 346).

## Tit. XXVI.

1. The power of removing guardians in England belongs, as has been said (Tit. XX.), to the Chancery Division.

6. There is nothing corresponding to *infamia* in English law, except so far as convictions for felony, blasphemy, bribery at elections, etc., disqualify for certain public positions and franchises. See Tit. XII. for an example; and see Bk. III. Tit. I. 5; Bk. IV. Tit. XVIII.

8. Probably the law is the same in England where the object of proceedings is simply to remove the guardian and not to force him to account.

13. For poverty in a guardian *ad litem*, see Tit. XXV., *Pr.* Possibly in other cases poverty would be no disqualification unless combined with other circumstances. Poverty is not a sufficient ground for appointing a receiver in the case of trustees (Lewin, 843).

# BOOK II.

## Tit. I.

*Pr.* The words *res* and *thing* are used in a very elastic sense in both Roman and English law. "The extension of the term *thing* is so extremely uncertain, that if it were expelled from the language of law much confusion would be avoided" (Austin, lect. xlvi.). The term is capable of an infinite number of divisions, according to the principle of division adopted. The division here adopted by the Institutes is into: (1) *in patrimonio* and *extra patrimonium;* (2) *communes, publicæ, universitatis, nullius, singulorum;* (3) *corporales* and *incorporales.* Austin (lect. xlvi.) enumerates: (1) corporeal and incorporeal; (2) movable and immovable; (3) *mancipi* and *nec mancipi;* (4) determined specifically and determined by their kind; (5) fungible and not fungible; (6) *singulæ* and *universitates.* Of these, (3) had disappeared between the time of Gaius and Justinian, owing to the abolition of *mancipatio* (Sandars, *ad loc.*). Another division of frequent occurrence and great importance in England is into things in possession and things in action. A thing (or *chose*) in possession is any movable piece of goods, visible and tangible in its nature, and in the possession of the owner or of some person on his behalf. A thing

(or *chose*) in action is the subject of an action, brought to recover pecuniary damages for the infliction of a wrong or the non-performance of a contract, or else to procure the payment of money due (Williams, P. P. Introd.; see *Fleet* v. *Perrins*, L. R. 4 Q. B. 500). The principal *choses* in action are debts, legacies, and stocks and shares. The confusion in which the term *thing* is involved is illustrated by the difference of meaning attributed to *chose* in action: it seems to be used sometimes to signify the right of suing for a debt, legacy, etc., sometimes to signify the debt, legacy, etc., itself.

The very word *chose* itself increases the difficulty, for *chose* is etymologically connected with *causa*, not *res*. No doubt *res* might include *causa*, but *causa* seems to be a much less extensive term than *thing*. (For *causa* see Bk. III. Tit. XIV. 2.) *Thing* is defined by Professor Holland (p. 69), following Austin, as "a permanent external cause of sensations;" but this is for purposes of jurisprudence, and could scarcely include incorporeal things and *choses* in action. The other divisions of things will be noticed in the course of this and the following title.

1. The air in English law cannot be the subject of property. Rights to light and air are frequently classed together in English law-books, but it is doubtful whether there can be any right to access of air beyond that which the public enjoy (*Bryant* v. *Lefever*, 4 C. P. D. 172).

Running water, so far as it is not tidal, belongs *primâ facie* to the owners of the land on either side of it, subject to the public right of navigation, where such exists (*Crossley* v. *Lightowler*, L. R. 3 Eq. 279; *Lyon* v. *Fishmongers' Co.*, 1 App. Cas. 662); therefore there can be no public right of fishing in a river, even though navigable, where the tide does not ebb and flow

(*Murphy* v. *Ryan*, I. R. 2 C. L. 143; *Pearce* v. *Scotcher*, 9 Q. B. D. 162). For the right in a fresh-water lake, see *Bristow* v. *Cormican*, 3 App. Cas. 641.

The sea is common in English law as in Roman, but, for purposes of national safety, the State has a right of jurisdiction for purposes of revenue and police for a distance (now generally acknowledged by most nations) of a marine league from low-water mark (*Reg.* v. *Keyn*, 2 Ex. D. 63). The English legislature has, moreover, by the Territorial Waters Jurisdiction Act, 1878 (41 & 42 Vict. c. 73), assumed the right (how far such right would be acknowledged by other nations may be a question) of legislating for crimes committed by foreigners on foreign ships within the territorial waters of the United Kingdom. Rights of fishery and rights over pirates met with on the high seas are common to all, except where any treaty engagements interfere. For territorial seas (as the Black Sea once was) and bays, see 1 Twiss, ch. x.; 1 Phillimore, ch. viii.; *Direct United States Cable Co.* v. *Anglo-American Telegraph Co.*, 2 App. Cas. 394.

The sea-shore between high and low water mark (called the foreshore) is *primâ facie* the property of the Crown (Hale, De Jure Maris). The soil may, however, be vested in a private individual, or in the lord of the manor, by grant from the Crown. This right must be strictly proved, as it is in derogation of the free use and enjoyment of the shore by the public (Addison, ch. vi. s. 2). The rights of the public or of the private proprietor are subject to any private rights existing by prescription or custom, as of drying nets (Bro. Abr. Customs), or fishing for oysters (*Goodman* v. *Mayor of Saltash*, 7 App. Cas. 633), or bathing (*R.* v. *Crunden*, 2 Camp. 89). Between high-water and low-water mark the common law and the Admiralty have at common

law *divisum imperium*, an alternate jurisdiction, one upon the water, when it is full sea, the other upon the land, when it is at ebb (*Constable's Case*, 5 Rep. 107 a). But this rule is of little modern importance.

2. What is the exact difference between the *aqua profluens* of the last paragraph and the *flumina* of this it is impossible to say. In England, a distinction is drawn between the tidal and non-tidal parts of rivers. The non-tidal, as was said above, are private property; the tidal or estuaries belong *primâ facie* to the Crown, independently of any ownership in the adjoining lands, but subject to the public right of navigation, and to any private rights similar to those attaching in certain cases to the sea-shore (Addison, ch. iv. s. 1). The public have also a *primâ facie* right of fishery therein, and it falls upon the person disputing this right to show that he has a several fishery (*Reg.* v. *Stimpson*, 32 L. J. M. C. 208); also a right of anchorage, so that no anchorage dues are claimable unless some service to navigation is or has been rendered in return, or unless a port has been created by the Crown (*Foreman* v. *Free Fishers of Whitstable*, L. R. 4 H. L. 266).

Ports or havens are such places as the sovereign in his wisdom sees proper to appoint for persons and merchandise to pass in and out of the realm (Hale, De Portibus Maris). However commodious a place may be for the shelter of vessels, it will not therefore be a port, the establishment of which must be by authority of the Crown (*Foreman* v. *Free Fishers of Whitstable*, *supra*). The rights of fishery seem to be the same as those in estuaries, so far as they are not affected by legislation.

3. The ordinary limit of the sea-shore is the line of the medium high tide between the spring and neap tides (*Attorney-General* v. *Chambers*, 4 De G. M. & G.

213). The limits of the shore in estuaries differ according as they are regarded for purposes of Admiralty jurisdiction or for purposes of Crown rights. The Admiralty jurisdiction extends as far as the first bridge (*Reg.* v. *Anderson*, L. R. 1 C. C. R. 161), the Crown rights only as far as the sea flows and reflows (Hale, De Jure Maris). This limit has been recognized by statute (29 & 30 Vict. c. 62, s. 7), and, as to the computation of tides, falls within the rule in *Attorney-General* v. *Chambers* (*supra*). Waters are not tidal when they are only affected by exceptionally high tides (*Reece* v. *Miller*, 8 Q. B. D. 626).

4. For all reasonable purposes of navigation, the shore is by common right subject to the free egress and regress of the public. But this does not authorize any permanent appropriation of the shore (Hall on the Sea-shore, 48 (f)). Therefore the right of towing does not exist at common law, unless by local usage (*Winch* v. *Conservators of the Thames*, L. R. 7 C. P. 458). The right to fasten vessels or to place cargo on the shore, though it has been affirmed by some decisions in America, appears not to exist in English law (Hall, *ubi supra*).

The property in the trees is the same in both English and Roman law.

5. No one has a right to build a cottage on the sea-shore in England, and by doing so he becomes a trespasser. Nor is there any general right of the public to dry nets upon the shore, but such a right may be gained by prescription or custom (*Gray* v. *Bond*, 2 B. & B. 267).

6. In England, theatres and race-courses are usually the property of private persons (whether single or in joint-stock companies) rather than of corporations—the nearest English equivalent to *universitates*. For the

difference between corporations and companies, see Lindley, Introd.

7. There seems to be nothing in English law corresponding to *res nullius*, for it is a maxim of English law that all property to which no title can be shown by a subject belongs to the Crown, *quod nullius est fit domini regis* (Mackenzie, pt. ii. ch. iii.); hence *wreccum maris*, a *res nullius* in Bracton (8 a), belongs to the Crown (par. 48).

8. *Res sacræ* correspond to consecrated buildings, but consecrated buildings are vested in some authority, in spite of their consecrated character. Thus a cathedral seems to be vested in the dean and chapter, while in a church the nave and greater chancel are the freehold of the parson, subject to use by the parishioners for worship (Cripps, bk. iii. ch. ii. s. 2). A lesser chancel may be the property of a private person (*Duke of Norfolk* v. *Arbuthnot*, 4 C. P. D. 290; 5 C. P. D. 390). As to proprietary chapels and places of worship belonging to the Roman Catholics and to Nonconformists, the law does not recognize them as consecrated buildings, but the clergy, ministers, and worshippers in them are protected from disturbance by 23 & 24 Vict. c. 32; 24 & 25 Vict. c. 100, s. 36.

A church having been once consecrated cannot be unconsecrated but by Act of Parliament (*Ex parte Greenhouse*, 1 Mad. 108; *Reg.* v. *Twiss*, L. R. 4 Q. B. 407). The ground upon which a church has stood is, as in Roman law, sacred, and cannot, any more than the church, be unconsecrated except by Parliament, though the church may be removed to a more convenient site by faculty in a fit case (Cripps, *ubi supra*).

9. "Some part of the Roman rules relating to this class of things still affects our law of churchyards"

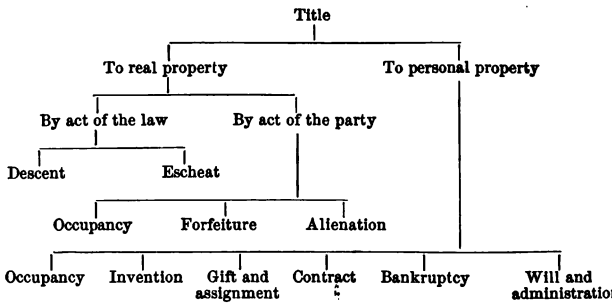
(Maine, Early Law and Custom, ch. iii.). In England, burial may take place either in consecrated or unconsecrated ground. In the former case the burial may be either within or without a church. To burial in the churchyard (unless closed by Order in Council) parishioners have a common law right; but it is otherwise with regard to burials in the church, which can only take place with the assent of the incumbent, unless the right is granted by a faculty for a family vault, or exists by prescription (Cripps, bk. vi. ch. iv.). Burials in cemeteries are regulated by various Acts of Parliament, for which see Cripps, *ubi supra*. A certain portion of the cemetery is required to be unconsecrated, but the part of it to be used as a burial-place of the Church of England must be consecrated, or licensed until consecration (15 & 16 Vict. c. 85, s. 30; 20 & 21 Vict. c. 81, ss. 11, 12). Every person dying in England and not within certain ecclesiastical prohibitions is entitled to Christian burial (*Reg.* v. *Stewart*, 12 A. & E. 773). A man is bound to bury his child's body, and probably his wife's (Stephen, C. L. 106).

10. Besides the *res sanctæ* mentioned in this paragraph, Roman law included ambassadors as *sanctæ personæ* (Dig. l. 7, 17). See on the inviolability of ambassadors, 1 Twiss, ch. xi.; 2 Phillimore, pt. vi. ch. v.–ix.

The term sanction was adopted by Bentham, and has been used generally since by English writers on jurisprudence. Its meaning is much the same as that which it bears in this paragraph. It is defined by Austin (lect. i.) as "the evil which will probably be incurred in case a command be disobeyed." Bentham's well-known division of sanctions is into physical, political, moral, and religious (Principles of Morals and Legislation, ch. iii.).

11. The various modes of acquiring property given

in the Institutes may be compared with the analysis of Title in Stephen's Commentaries :—




12. The law as to *feræ naturæ* is almost the same in England. The only difference seems to be that English law recognizes a qualified property in game, to the extent of protecting it so long as it remains upon the land of any particular person, but not to the extent of recognizing any proprietary right after it has once quitted the land, even though it may have been improperly driven away. For if A starts a hare in the ground of B and hunts it into the ground of C, and kills it there, the property is in A, the hunter, although he is liable to actions of trespass by B and C (*Sutton* v. *Moody*, 1 Ld. Raym. 250). In *feræ naturæ*, properly so called, there can be no property as long as they are alive (*Hannam* v. *Mockett*, 2 B. & C. 934); but if they are dead, reclaimed, or confined, they are the subjects of property, and larceny of them may be committed at common law (3 Inst. 116; Roscoe, Crim. Evid., *s.v.* "Feræ Naturæ." See, too, Comyn's Digest, Biens, F). Dogs, which were not subjects of larceny at common law, are now protected by 24 & 25 Vict. c. 96, s. 18. Herons building in trees have been held to give an interest to the owner of the trees, by reason of the

trees in which they built (*Bishop of London's case*, Year Book, 14 Hen. VIII., 1).

13. Several cases have arisen in England as to the rights of whalers over a fish which has been struck by more than one harpooner. The rule adopted by the English courts seems to be the second alternative of the Institutes; for if the first harpoon or line breaks, or the line attached to the harpoon is not in the power of the striker, the fish will become the property of any other person who strikes and obtains it (Addison, ch. vii. s. 2, *q.v.* for the cases on the subject). Where the plaintiff while fishing for pilchards had nearly encompassed a quantity of fish with a net, and would have captured them but for the interference of the defendant, who came and drove the fish into his own nets and captured them, it was held that the plaintiff could set up no title to the fish, as he never had them under his dominion and control (*Young* v. *Hichens*, 6 Q. B. 606).

14. The law appears to be the same in England, but the reason given for it by Blackstone is different, viz. that a qualified property may be had in bees in consideration of the property of the soil whereon they are found (2 Stephen, bk. ii. ch. i., note (h)). "Bees are property, and are the subject of larceny" (Bayley, J., in *Hannam* v. *Mockett*, 2 B. & C. 944); but this can only be when they have been reduced into possession and hived (2 East, P. C. 607).

15. Pigeons, though unconfined and with free access at their pleasure to the open air, have been held to be the subjects of larceny (*Reg.* v. *Cheafor*, 2 Den. C. C. 361). The *animus revertendi* has been adopted as a test by Blackstone (see 2 Stephen, bk. ii. ch. i.). Larceny may be committed of the flesh or skins of *feræ naturæ*, though no indictment could be maintained for stealing the living animal (1 Hale, P. C. 83); and animals not

the subjects of larceny are now protected by 24 & 25 Vict. c. 96, s. 21.

17. In England, all enemy's property acquired either on land or sea is acquired for the Crown. "Prize is a creature of the Crown. No man has or can have any interest but what he takes as the mere gift of the Crown. . . . This is no peculiar doctrine of our constitution; it is universally received as a necessary principle of public jurisprudence by all writers on the subject. *Parta bello cedunt reipublicæ*" (Lord Stowell in *The Elsebe*, 5 C. Rob. 184). See *Alexander* v. *Duke of Wellington*, 2 R. & M. 54, for the same rule applied to booty of war. The judge of the High Court of Admiralty, while that court existed, exercised by royal warrant the office of judge of the Prize Court. "Should occasion arise there is no reason to suppose that any other person than the judge of the Admiralty Division will occupy the position of the judge of the Naval Prize Court" (Roscoe, Adm. Prac. Introd.). The High Court of Admiralty had also, by 3 & 4 Vict. c. 65, s. 22, jurisdiction to decide all such matters and questions concerning booty of war, or the distribution thereof, as should be referred to it by the Queen in Council. See the case of *The Banda & Kirwee Booty*, L. R. 1 A. & E. 109.

Prisoners of war are in modern times frequently exchanged during the continuance of the war, and the treaty of peace (*e.g.* the Treaty of Paris, March 30, 1856) usually contains a stipulation that the prisoners on both sides shall be released (2 Twiss, ch. ix.).

18. In English law the finder has a good title against all the world but the true owner (*Armory* v. *Delamirie*, 1 Smith, L. C.). (The rule does not apply to treasure-trove; see on par. 39.) This is important with regard to the law of larceny, where the rule is, that in order to

constitute the larceny of lost goods there must be a felonious intent at the time of the finding, coupled with reasonable means at the same time of knowing the owner. Thus, in *Reg.* v. *Glyde*, L. R. 1 C. C. R. 139, a man found a sovereign, and had no means of knowing the owner, but intended at the same time to keep it as against the owner, and upon the owner being found refused to give it up. It was held that this was no larceny.

19. The English law is the same, except in the case of young cygnets, which belong equally to the owners of the cock and hen, and are to be divided between them (*Case of Swans*, 7 Rep. 17; 2 Stephen, bk. ii. pt. ii. ch. ii.).

20. "Gradual accretions of land from water belong to the owner of the land gradually added to (*R.* v. *Yarborough*, 3 B. & C. 91), and conversely, land gradually encroached upon by water ceases to belong to the former owner (*Re Hull & Selby Ry. Co.*, 5 M. & W. 327)" (Lindley, J., in *Foster* v. *Wright*, 4 C. P. D. 416). Blackstone supports the law on the principle *de minimis non curat lex* (1 Stephen, bk. ii. pt. i. ch. xiii.).

21. "If a river running between two lordships by degrees gains upon the one and thereby leaves the other dry, the owner who loses his ground thus imperceptibly has no remedy; but if the course of the river be changed by a sudden and violent flood, or other hasty means, his land will not be lost" (*ibid.*).

As to the test of the trees taking root, there seems to be no authority more recent than Bracton (9 a), who agrees with Roman law.

22. A new island rising in the sea is by English law the property of the Crown, on the same principle as lands newly discovered (see 1 Twiss, ch. vii.).

The rule as to the property in an island appears to

be the same in England in those cases where the soil of the river is equally divided between the riparian owners, for if the whole soil is the freehold of any one person, as it usually is when a several fishery is claimed (*Marshall* v. *Ullswater Steam Navigation Co.*, 32 L. J. Q. B. 139), there the islands arising in any part of the river are the property of the owner of the piscary and the soil (2 Stephen, bk. ii. pt. i. ch. xiii.).

In a Scotch case in the House of Lords (*Earl of Zetland* v. *Glover Incorporation of Perth*, L. R. 2 H. L. Sc. 70), it was held that, in the event of a shifting island springing up in the channel of a river, if such island becomes fixedly annexed to and incorporated with the bank of one of the riparian proprietors, the permanent accretion gives rise to a new *medium filum*.

23. "If a fresh river between the lands of two lords or owners do insensibly gain on one or the other side, it is held (22 Ass. 93) that the proprietory continues as before in the river" (Hale, De Jure Maris, ch. i.). See *Foster* v. *Wright*, 4 C. P. D. 438.

The law as to accretion is the same in the case of the sea and its arms and other waters (Lindley, J., in *Foster* v. *Wright*, *supra*). Therefore the following extract from the judgment of Kelly, C.B., in *Mayor of Carlisle* v. *Graham*, L. R. 4 Ex. 368, may be applied to non-tidal waters. "All the authorities, ancient and modern, are uniform to the effect that if by the irruption of the waters of a tidal river a new channel is formed in the land of a subject, although the rights of the Crown and of the public may come into existence and be exercised in what has thus become a portion of a tidal river, or of an arm of the sea, the right to the soil remains in the owner, so that if at any time thereafter the waters shall recede and the river again change its course, leaving the new channel dry, the soil again becomes the

exclusive property of the owner, free from all rights whatsoever in the Crown or in the public." It was held in that case that a several fishery in a tidal river, the waters of which have permanently receded from one channel and flow in another, cannot be followed from the old to the new channel.

24. A sudden inundation from the sea will not deprive the former owner of the land submerged of his right (Hale, De Jure Maris). If the inundation be caused by the act of an adjoining proprietor, he may in certain cases have a right of action for the tort (see authorities in *Hudson* v. *Tabor*, 2 Q. B. D. 290).

25. "In all cases where a thing is taken tortuously and altered in form, if that which remains is the principal part of the substance, then is not the notice of them lost, and so the property of them not altered. As if a man takes cloth and makes thereof a robe, the owner may retake it, for the nature is not changed. But where grain is taken and made into malt, or money taken and made into a cup, or a cup made into money, those cannot be taken, for grain cannot be known one from another, nor one penny from another" (Vin. Abr., Property, E.). This paragraph was used in argument in *South Australian Insurance Co.* v. *Randall*, L. R. 3 P. C. 101, where the question was whether a certain transaction was a sale or bailment, and this depended upon whether a new *species* had been created or not.

26. "If a man takes my garment and embroiders it with silk or gold, etc., I may take my garment; but if I take the said silk from you, and with this face or embroider my garment, you shall not take my garment for your silk, which is in it, but are put to your action for taking of the silk from you" (Vin. Abr., *ubi supra*).

27. The law as to this is apparently the same in England.

28. If A and B are at play, and A intermingles his money in B's heap of money, B shall now have all, for this is done by A of his own wrong and as a trick, with intent to deceive B. And should it be otherwise, B would be a trespasser *nolens volens*, by taking his money again, and to avoid this inconvenience the law is that B shall retain all. So if A will intermingle his corn with B's corn, B may take all for the same reason (*Ward* v. *Eyre*, 2 Bulst. 323). If one blends his money with mine, by rendering my property uncertain he loses his own (*Fellows* v. *Mitchell*, 2 Vern. 516). But if the intermixture be by consent, it seems that the proprietors have an interest in common in proportion to their respective shares (see the judgment of Blackburn, J., in *Buckley* v. *Gross*, 3 B. & S. 566). Further, if the goods continue to be distinguishable, as in the case of articles of furniture thrown together, the confusion makes no alteration in the property (*Colwill* v. *Reeves*, 2 Camp. 576).

29. If a man takes timber and makes a house of it, this cannot be retaken, for the nature is altered into frank-tenement (Vin. Abr., *ubi supra*). The maxim of English law—*quidquid plantatur solo solo cedit*—is obviously founded upon this paragraph (see *Wake* v. *Harrop*, 8 App. Cas. 195, where this and the following paragraphs were cited in the argument).

30. If a man eject another from land, and afterwards build upon it, the building belongs to the owner of the ground on which it is built (Broom, Legal Maxims, note on *cujus est solum ejus est usque ad cœlum*). An intruder who has run up a hut and occupied it has no right to the hut or the possession thereof, and the landlord may enter and pull down the hut and remove the materials (*Davison* v. *Wilson*, 11 Q. B. 890). So of a house built as an encroachment upon a common (*Davies*

v. *Williams*, 16 Q. B. 546), but notice should first be given to the occupier of the nuisance, and he should be required to abate it (*Jones* v. *Jones*, 1 H. & C. 1). If the case be one of good faith, *e.g.* if a person having a title to an estate stand by and see another spend money upon the estate, the person so expending money is entitled to compensation, or, if a lessee under a defective title, to a confirmation of his lease (see the note to *Savage* v. *Foster*, 2 White and Tudor, L. C.; see also note to par. 35, *infra*).

*Dolus* seems used, where it occurs in English law, in the Roman sense, as in the maxim, *Dolus circuitu non purgatur.* In the judgment of the Exchequer Chamber in *Thompson* v. *Hopper* (E. B. & E. 1038) will be found a discussion of the term. It is practically synonymous with fraud; "fraud which is *dolus malus*," says Lord Hardwicke in *Earl of Chesterfield* v. *Janssen*, 1 White & Tudor, L. C. *Dolus* might be either *malus* or *bonus* (Sandars, *ad loc.*). Compare with this the distinction once taken in English law between moral and legal fraud (see the note to *Pasley* v. *Freeman*, 2 Smith, L. C.). This distinction seems now to be obsolete. "I am of opinion," says Bramwell, L.J., in *Weir* v. *Bell*, 3 Ex. D. 243, "with an exception I will presently advert to" (viz. the undertaking by a principal for the absence of fraud in the agent), "that to make a man liable for fraud, moral fraud must be proved against him. I do not understand legal fraud. To my mind it has no more meaning than legal heat or legal cold, legal light or legal shade." For the connection of *dolus* with *culpa*, see note on Bk. III. Tit. XXV. 9.

31. English law seems a little different. "If a tree grows in a hedge which divides the land of A and B, and by the roots takes nourishment in the land of A

and also in the land of B, they are tenants in common of the tree, and so it was adjudged" (*Anon*, 2 Rolle, 141). But this must be understood of fences of which the adjoining owners are tenants in common; for the general rule is that the ownership of the tree follows the ownership of the hedge, and the tree will be held to belong to the party on whose land the trunk stands without reference to the direction of the roots (Addison, ch. vi. s. 2; *Masters* v. *Pollie*, 2 Rolle, 255).

32. The right to crops sown, though generally passing with the land, does not universally do so. For in the case of a tenant for life, if he dies before the harvest, his executors shall have the crop or emblements, for the estate was determined by the act of God (1 Stephen, bk. ii. pt. i. ch. iv.). So in the case of a tenant for years, whose interest depends upon an uncertainty (*ibid.*, ch. v.). But with respect to tenants at rack rent, 14 & 15 Vict. c. 25, s. 1, provides that when the tenant's interest determines by the death or cesser of the estate of a landlord entitled for his life or any other uncertain interest, the tenant is to have in place of emblements the right to occupy his farm or lands until the expiration of the then current year of his tenancy, paying a fair proportion of rent to the succeeding owner.

As to sowing another man's land, "if A licenses B to sow A's land, and B sows it, yet A, the owner of the land, shall reap it. But if a man enters upon another's land and sow it, it is his corn till he that hath right reenters" (Vin. Abr., Property, D). This is in accordance with the maxim quoted above, *quidquid plantatur solo solo cedit.*

33. The law of larceny illustrates the Roman law of this paragraph. Larceny could not, by the common law, be committed of written instruments, whether they related to real estate or concerned choses in action. Nor

in such a case could the prisoner be convicted of stealing a piece of parchment or paper (*Westbeer's Case*, 1 Leach, 12). In this case, therefore, the accession seems to have been of the material to the letters, not *vice versâ*, as in Roman law. But a cheque, bill of exchange, etc., void for any reason (as for want of a stamp), might be described as a piece of paper, as in *Reg.* v. *Perry*, 2 Den. C. C. 69. For larceny of written instruments, see now 24 & 25 Vict. c. 96.

34. There does not appear to be any authority on this exact point in English law, but see the notes on s. 25, *et seq.* "By some, if a man takes a white piece and causes it to be gilt, the owner cannot retake it" (Vin. Abr., Property, E). Here the less valuable silver seems to accede to the more valuable gold; but whether this authority would govern the case of a painting on the canvas of another cannot be said.

35. As a general rule, in English law a purchaser for valuable consideration without notice of an adverse title has an indefeasible title (see *Basset* v. *Nosworthy*, 2 White & Tudor, L. C. 1, and the notes thereto; Lewin, ch. xi. s. 1), so that the question of *fructus* could not arise in this case. In the case of personalty, if the defendant in an action for conversion, acting *bonâ fide* under the belief that he had acquired the lawful ownership of the chattel, laid out money upon it and improved it and increased its value, the plaintiff cannot, as a rule, recover more than it was worth at the time of the conversion (*Read* v. *Fairbanks*, 13 C. B. 729).

The last sentence in the paragraph agrees with English law. Where A was entitled to a leasehold estate, but B, concealing the deeds, remained in possession until the term had expired, an account of the rents and profits from the time that A's title had

accrued was directed, on the ground that A had been kept in ignorance of his rights through B's fraud (*Bennett* v. *Whitehead*, 2 P. Wms. 644).

36. See Tit. IV.

38. *Quasi bonus paterfamilias* is like the English expression "in a husbandlike manner." See, for instance, *Lewis Bowles' Case* (Tudor, L. C. and notes) as to the right of a tenant for life without impeachment of waste to cut timber in a husbandlike manner. So what is called in English law "ordinary diligence," is in Roman law the diligence shown by a good *paterfamilias* (see Jones on Bailments, 6). The amount of diligence necessary in different kinds of bailments will be found in the note to Bk. III. Tit. XIV. 2.

39. "Treasure trove, *thesaurus inventus*, is where any money, coin, gold, silver, plate, or bullion is found hidden in the earth or other private place, the owner thereof being unknown, and in such case the treasure found belongs to the Crown; but if he that hid it be known, or afterwards found out, the owner and not the sovereign is entitled to it" (2 Stephen, bk. iv. pt. i. ch. vii.). "Nothing is said to be treasure trove but gold and silver" (2 Inst. 577). In all other cases of finding the thing found becomes the property of the finder, as if any man happen to find in the sea or seashore precious stones, fishes, or the like (Vin. Abr., Treasure Trove, A; see note on s. 18). The principle of treasure trove becomes important in the case of mines, for the Crown is entitled to all mines of silver and gold (2 Inst. 577). This right, of little value in England, may become important in Australia (see *e.g.* *Woolley* v. *Attorney-General of Victoria*, 2 App. Cas. 163). These are the only mines which the Crown possesses by virtue of the prerogative; in other instances of mines owned by the Crown, as in the

Forest of Dean (*James* v. *Reg.*, 5 Ch. D. 153) or the Isle of Man (*Attorney-General for the Isle of Man* v. *Mylchreest*, 4 App. Cas. 294), the title is different.

Here may be noticed a form of occupancy peculiar to English law. He who enters upon the land of a deceased tenant for life during the lifetime of the *cestui que vie* is called a general occupant, and may hold for the life of the *cestui que vie;* if the grant was made to a man and his heirs during the life of the *cestui que vie*, and the heir enters on the death of the tenant for life, he is called a special occupant. The interest of the tenant may be disposed of by will (7 Will. IV. and 1 Vict. c. 26, ss. 3, 6). There is no general occupancy in copyhold (*Doe* v. *Scott*, 4 B. & C. 706).

For occupancy in its historical aspect, see Maine, ch. viii.

40. Delivery is not necessary in England in order to pass the property in goods in the case of sale. Where goods are sold and nothing is said as to the time of delivery or of payment, and everything the seller has to do with them is complete, the property vests in the buyer, so as to subject him to the risk of any accident which may happen to the goods (*Tarling* v. *Baxter*, 6 B. & C. 360). If goods are sold "upon credit, and nothing is agreed upon as to the time of delivering the goods, the vendee is immediately entitled to the possession, and the right of possession and the right of property vest at once in him; but his right of possession is not absolute, it is liable to be defeated" (*i.e.* by the right of stoppage *in transitu*) "if he becomes insolvent before he obtains possession" (Bayley, J., in *Bloxam* v. *Sanders*, 4 B. & C. 948). Of course the property will not pass if there are any other conditions necessary, such as weighing or appropriating, or compliance with

any particular statute (such as the Statute of Frauds), without the performance of those conditions.

Delivery is necessary in certain cases not of contract in order to pass the property. It is necessary in the case of: (1) *donationes mortis causâ* (see Tit. VII.); (2) feoffments with livery of seisin made by infants under the custom of gavelkind (1 Davidson, Precedent vi. and notes); (3) sales under the 17th section of the Statute of Frauds in certain events, the words "accept and actually receive" in that section importing delivery (Benjamin, bk. i. pt. ii. ch. iv.).

As to a gift of personal chattels, the law formerly was that unless the gift were by deed or instrument under seal, delivery was necessary (*Irons* v. *Smallpiece*, 2 B. & A. 551); but it seems that now delivery of the chattel is not in every case necessary to make a good gift *inter vivos*. It is sufficient if the conduct of the parties shows that the ownership of the chattel has been changed (2 Davidson, pt. ii. 143).

In the case of delivery of a deed (1 Stephen, bk. ii. pt. i. ch. xvi.), the delivery operates rather as essential to the validity of the deed than as transferring property, for delivery of the deed is necessary even when there is no transfer of property, as in the case of a deed of resignation of holy orders under 33 & 34 Vict. c. 91.

41. The consideration for sale in modern English law is not the actual payment of the price, but the purchaser's obligation to pay the price (Benjamin, bk. ii. ch. ii.). After the sale the purchaser has immediately a right to the goods, and the vendor to the price; but the vendor has a lien for the price, *i.e.* a right of retaining the goods until the price has been paid (Benjamin, bk. iv. pt. i. ch. iv.).

In the case of a sale of goods upon credit, the English

law agrees with the Roman, subject always to the right of the vendor to stop the goods *in transitu* upon the insolvency of the purchaser (*Lickbarrow* v. *Mason*, 1 Smith, L. C., and notes thereon). This right cannot in England be exercised when possession, actual or constructive, has been taken; but in Roman law the lien of an unpaid vendor prevailed even against actual possession, Lord Eldon in *Mackreth* v. *Symmons*, 1 White & Tudor, L. C., citing Dig. xviii. 1, 1, 11.

In a modern case in the Court of Exchequer (not reported) it was held that the property in a specified chattel bought in a shop, to be paid for on being sent home, did not pass until delivery (*Lampleigh* v. *Braithwait*, 1 Smith, L. C., note).

42. The English law is the same. If one person could act for another in Roman law, he can generally do so in a similar case in England; but the converse does not hold good, owing to the greater development of the law of agency in England (see Bk. III. Tit. XXVI.).

44. The case of *Winter* v. *Winter*, 9 W. R. 747, agrees with the law of this paragraph. Compare, too, the cases where one person has been held to be trustee for another of property given without delivery. "If A (who has £1000 consols standing in his name) says to B, 'I give you the £1000 consols standing in my name,' that in my opinion would make A a trustee for B. It would be a valid declaration of trust for B, though the stock remained in the name of A" (Lord Romilly in *Grant* v. *Grant*, 34 Beav. 623). See *Morgan* v. *Malleson*, L. R. 10 Eq. 475, and *Re Breton's Estate*, 17 Ch. D. 416, where the circumstances were held insufficient to effect a transmutation of property by constituting the husband a trustee for the wife. The cases on the subject do not seem easily reconcilable

(see the note to *Ellison* v. *Ellison*, 1 White & Tudor, L. C.).

45. "There need not be an actual delivery, but there may be something tantamount, such as the delivery to the buyer of a key of the warehouse in which the goods are lodged, or the delivery of other *indicia* of property" (Lord Kenyon, C.J., in *Chaplin* v. *Rogers*, 1 East, 192. And see judgment of Willes, J., in *Meyerstein* v. *Barber*, L. R. 2 C. P. 52). Other examples of a symbolical or constructive mode of delivery are seen in bills of lading, dock warrants, samples, change of name in a warehouse-book, etc. In the case of livery of seisin, delivery of a clod or turf, a ring or latch, was usually made in the name of the whole (1 Stephen, bk. ii. pt. i. ch. xvii.).

46. The principle of the law laid down in this paragraph is illustrated by the English law as to contracts by advertisement. The person answering the advertisement is an *incerta persona* until he answers it; the contract then becomes a contract between ascertained persons, which is constituted by the acceptance of the proposal (Pollock, ch. v.). "A proposal need not be made to an ascertained person, but no contract can arise until it has been accepted by an ascertained person" (Anson, pt. ii. ch. i. s. 7).

47. "*Bona vacantia* are considered as returning, as it were, into the common stock of mankind, and consequently belong (as in a state of nature) to the first occupant or finder; though he is bound before he appropriates them to take reasonable pains to discover the former owner, whose right remains, unless they were designedly abandoned by him" (2 Stephen, bk. iv. pt. i. ch. vii.). Wrecks, treasure-trove, and waifs and strays are excepted, as being crown droits (*ibid.*). The case in which abandonment most often appears is in

questions arising between shipowners and underwriters. Total loss of a ship may be actual or constructive. In the latter case the assured is bound formally to abandon all his remaining right in the property to the underwriter, and to give the latter notice within a proper time after intelligence of the disaster (2 Stephen, bk. ii. pt. ii. ch. v. See, too, *Provincial Insurance Co. of Canada* v. *Leduc*, L. R. 6 P. C. 204).

48. Goods thrown out of a ship, if they came to land, constituted wreck, and were the property of the Crown as *res nullius* (see par. 7), unless the revenue of wrecks had been granted to the lord of a manor as a royal franchise. But if any live thing escaped, or if proof could be given of ownership, the goods were not forfeited as wreck. If the goods continued at sea, they were called *flotsam*, *jetsam*, or *ligan*, according to circumstances. Such goods also belonged to the Crown in default of an owner (2 Stephen, bk. iv. pt. i. ch. vii.). At the present day wreck (which includes *flotsam*, *jetsam*, and *ligan*) falls under the jurisdiction of the receivers of wreck, appointed by the Merchant Shipping Act, 1854, and all wreck must be delivered to them (17 & 18 Vict. c. 104, s. 450). The Crown still maintains its old right in case of default of an owner, when the proceeds, after payment of expenses and salvage, are paid into the exchequer (s. 475), or form part of the revenues of the Duchies of Lancaster and Cornwall (25 & 26 Vict. c. 63, s. 53).

Persons stealing or plundering wreck are guilty of felony (24 & 25 Vict. c. 96, s. 64).

## Tit. II.

*Pr.* This division has the fault of including purely fictitious things, as inheritance and obligation (Hunter, xxxiii.). In English law the division into corporeal and incorporeal is adopted in both real and personal property. In the former, corporeal hereditaments are those of which possession may actually be given up, as a house or land (Williams, R. P., Introd.), or, as Blackstone puts it, such as affect the senses, such as may be seen and handled by the body (1 Stephen, bk. ii. pt. i. ch. i.). Incorporeal are not the objects of sensation, can neither be seen nor handled, are creatures of the mind, and exist only in contemplation (*ibid.*). The latter include advowsons, tithes, commons, ways, water-courses, lights, offices, dignities, franchises, corodies, pensions, annuities, and rents (1 Stephen, bk. ii. pt. i. ch. xxiii.); Williams on Rights of Common, lect. xix.). There was formerly a difference in the mode in which corporeal and incorporeal hereditaments were conveyed, the former being said to lie in livery, the latter in grant. But since 8 & 9 Vict. c. 106, s. 2, corporeal hereditaments have been deemed to lie in grant.

In regard to personal property, the principal incorporeal chattels are personal annuities, stocks and shares, patents and copyrights (Williams, P. P., pt. iii. ch. i.). The division of things into corporeal and incorporeal is criticized by Austin (lect. xlvi.), on the ground that the division co-ordinates things considered as the subjects of rights with the rights themselves.

3. So far as easements and *profits à prendre* represent servitudes, they would fall under the same division in English law (see note on the paragraph above). An easement confers merely a convenience to be exercised

over the property of another without any participation in the profit of it; a *profit à prendre* is accompanied with a participation in the profits of the neighbouring soil. Both these classes are comprehended under servitudes. The Prescription Act (2 & 3 Will. IV. c. 71) includes both.

Some of the principal differences between the Roman and English law upon this subject are as follows:—(1) English law does not recognize the division into urban and rustic, but divides into (*a*) affirmative, as a right of way, and negative, as a right to light; (*b*) continuous, or those which need no interference from man, as a water-course, and discontinuous, or those which can only be enjoyed by the interference of man, as a right of way; (*c*) apparent, or those the existence of which is shown by external works, as a water-course, and non-apparent, or those which have no external sign of their existence, as the prohibition to build above a certain height (Gale, ch. ii.). (2) *Ususfructus*, *usus*, and *habitatio*, classed as personal servitudes in the Digest, would be considered in English law as rights of ownership limited in point of duration (Austin, lect. l.). (3) Each law has servitudes, which are for various reasons peculiar to itself, as *altius tollendi*, *stillicidii non recipiendi*, *operæ servorum* in Roman law, the right to a pew, to let down the surface of another's land by mining operations, to place a sign-post upon a common in England. (4) The Roman maxim, *Nulli res sua servit* (Dig. viii. 2, 26), is subject to a real or apparent exception in the case of light (see Tit. III. par. 1). (5) *Servitutes personarum* are given to individuals for their enjoyment and die with them; prædial servitudes are given to owners for the better enjoyment of their land, and follow the land (Hunter, 224). In English law an easement must be connected with an enjoyment of land, so that a right of way for

all purposes, including purposes unconnected with the land, cannot be claimed as appurtenant to the land (*Ackroyd* v. *Smith*, 10 C. B. 164). Therefore a right in gross cannot be an easement (*Rangeley* v. *Midland Railway Co.*, L. R. 3 Ch. 306), though it may be a *profit à prendre*, as in *Shuttleworth* v. *Le Fleming*, 19 C. B. N. S. 687. The Roman law is illustrated by the English division of prescription into prescription in a *que* estate and in a man and his ancestors (1 Stephen, bk. ii. pt. i. ch. xxiii.). The latter claimed by a private person is exceedingly rare, and there appear to be only two reported cases in modern times, *Welcome* v. *Upton*, 6 M. & W. 536, and *Shuttleworth* v. *Le Fleming*, *supra* (Williams on Rights of Common, 9). (6) By English law an easement can be claimed by prescription, custom, or grant; a *profit à prendre* (with very few exceptions, as copyholders, tinbounders in Cornwall, and inhabitants constituted a corporation by grant from the Crown in derogation of its forestal rights), only by prescription or grant, and not by custom (*Lord Rivers* v. *Adams*, 3 Ex. D. 361). In some cases the same claim may be spoken of either as prescription or custom, according to the manner in which it is viewed (Williams on Rights of Common, 279). This technical rule could have no meaning in Roman law, which drew no distinction between easements and *profits à prendre*. (7) There are at least two means by which easements may be created or extinguished which would have been unknown to Roman law, viz. by Act of Parliament, and by grant or release under seal (see Tudor, L. C., note to *Sury* v. *Pigot*). (8) In Roman law positive servitudes were lost *non utendo*, by neglect to use the right for ten years if the parties were present in the same province, otherwise in twenty years (Mackenzie, pt. ii. ch. v.). In English law a cesser of use, coupled with any act clearly indica-

tive of an intention to abandon the right, will be sufficient to destroy it without any reference to time. What period of time may be sufficient depends upon the circumstances of each particular case (*Reg.* v. *Chorley*, 12 Q. B. 519).

## Tit. III.

*Pr. Iter, actus, via* would all be included in English law under the head of right of way. A right of way may be either public or private; a public way, however, seems not to fall under the law of easement at all, as there is no servient tenement in such a case (*Rangeley* v. *Midland Railway Co.*, *supra*). A plea of footway is supported by proof of a carriage-way, for the latter includes the former (*Davies* v. *Stephens*, 7 C. & P. 570). Grantees of rights of way have been held entitled to put down flagstones (*Gerrard* v. *Cooke*, 2 B. & P. N. R. 511), and even tramways (*Senhouse* v. *Christian*, 1 T. R. 569), for the more convenient enjoyment of the way. The extent of the right is in all cases for the jury (*Cowling* v. *Higginson*, 4 M. & W. 245).

The right to the use of water flowing in a natural stream upon the surface of the earth belongs of right to the proprietors of the adjoining lands, but the right to use it to the prejudice of any proprietor of land above or below, by throwing back, diverting, or polluting it, is a right for which the claimant must show a title by contract, prescription, or other adequate authority (*Mason* v. *Hill*, 5 B. & Ad. 1). An artificial watercourse may have been originally made under such circumstances and have been so used as to give all the rights that the riparian proprietors would have had

had it been a natural stream (*Sutcliffe* v. *Booth*, 32 L. J. Q. B. 139). In the case of an artificial watercourse, long enjoyment will not give a right to the unobstructed use of a channel made obviously for temporary purposes (*Arkwright* v. *Gell*, 5 M. & W. 203).

1. The right of support in English law is either to subjacent, or to adjacent or lateral support. The *primâ facie* right of the owner of land to either kind of support is of common right, and not a mere easement (*Humphries* v. *Brogden*, 12 Q. B. 739); but the right of support is only a natural one so long as the land remains in its natural state. It is only by twenty years' user that a right of support can be acquired for buildings on the land (*Rogers* v. *Taylor*, 2 H. & N. 828), unless any injury caused by subsidence is in no degree due to the weight of the building (*Brown* v. *Robins*, 4 H. & N. 186). So as to lateral support, which may be acquired by twenty years' user for a building proved to have been newly built or to have increased its lateral pressure at the beginning of that time (*Dalton* v. *Angus*, 6 App. Cas. 740). As to support from buildings, where two ancient buildings adjoin, a right to support from the building as well as the land is claimable under the Prescription Act (*Lemaitre* v. *Davis*, 19 Ch. D. 281). This right only applies as against the owner of the next adjoining house (*Solomon* v. *Vintners' Co.*, 4 H. & N. 598). When the different floors and flats of the same house are held as separate freeholds by different persons, the owner of the lower rooms and foundation is in general bound to maintain the main walls and necessary supports of the rooms above (*Richards* v. *Rose*, 9 Ex. 221).

There does not seem to be any example of the *servitus tigni immittendi* in England.

The *servitus stillicidii recipiendi* has its corresponding

easement in England (*Thomas* v. *Thomas*, 2 C. M. & R. 34). The *servitus stillicidii non recipiendi* seems peculiar to Roman law. As to drains, when the owner of two or more adjoining houses sells or conveys one of the houses, the purchaser of the house is entitled to the benefit of all the drains from his house, and is subject to all the drains necessary to be used for the enjoyment of the adjoining house (*Pyer* v. *Carter*, 1 H. & N. 916). This case, however, is of doubtful authority and has been frequently questioned; the latest case in which it was so questioned is *Wheeldon* v. *Burrows*, 12 Ch. D. 31. The right to the use of a drain or sewer may, however, undoubtedly be granted expressly, whatever be the law as to an implied grant (*Lee* v. *Stevenson*, E. B. & E. 502). If the right to a drain only allows ordinary refuse water to be sent through it, the grantee cannot enlarge the right so as to send foul water through it (*Cawkwell* v. *Russell*, 26 L. J. Ex. 34).

From *Bryant* v. *Lefever*, 4 C. P. D. 172, it seems that access of air (as distinct from access of light) cannot be claimed either under the Prescription Act, by prescription at common law, by presumption of a lost grant, or as a natural right. The right to light stands on a different footing from the other rights mentioned in the Prescription Act, for (1) the proviso in s. 7, which excludes the time of infancy, idiocy, tenancy for life, etc., from computation does not apply to light; (2) the enjoyment need not be, as in s. 2, by a person "claiming right;" (3) the right becomes indefeasible in twenty years where the other rights mentioned in s. 2 would need forty years to become so; (4) the right may be established over the servient tenement when it is in possession of a tenant even as against the landlord, if the tenant chooses to submit to it (*Simper* v. *Foley*, 2 J. & H. 255). So where the plaintiff and defendant

held as lessees under the same landlord, it was held that twenty years' user gave one a right to the access of light against the other (*Frewen* v. *Phillips*, 11 C. B. N. S. 449). This seems inconsistent, though the inconsistency may be only apparent, with the Roman maxim, *Nulli res sua servit.*

2. The right to draw water from the well of another is an easement, and not a *profit à prendre*, and so is rightly claimed by custom (*Race* v. *Ward*, 4 E. & B. 702).

For the right of watering cattle, see *Manning* v. *Wasdale*, 5 A. & E. 758. The right of feeding cattle is found most frequently in the case of right of common of pasture over the waste of a manor; but in the case of *sola vestura* (Co. Litt., 122 b), common of shack (*Sir Miles Corbet's Case*, 7 Rep. 57), and common *pur cause de vicinage* (*Jones* v. *Robin*, 10 Q. B. 620), the right may exist as between inhabitants and not be connected with a manor. See on the connection of such rights with the ancient cultivation in common, Williams on Rights of Common; Elton, Origin of English History.

Copyholders may claim by custom the right to dig sand upon their tenements, but such a right does not fall within the Prescription Act, as it is not exercised upon the land of another (*Hanmer* v. *Chance*, 34 L. J. Ch. 413). A right to dig sand upon the sea-shore cannot be claimed by inhabitants of a particular district for the mending of their roads (*Blewitt* v. *Tregonning*, 3 A. & E. 554), but apparently mariners may claim by custom to dig for stones and ballast upon the shore (*Mayor of Lynn Reyis* v. *Taylor*, 3 Lev. 160), and a custom to dig sand in the waste for the repairs of a dwelling-house may be supported (*Peppin* v. *Shakspear*, 6 T. R. 748).

3. So in English law there can be no easement without a dominant and servient tenement (*Rangeley* v. *Midland Ry. Co.*, L. R. 3 Ch. 306), though a *profit à*

*prendre* may exist in gross, as a right of common (Co. Litt., 122 b), a right of several fishery (*Shuttleworth* v. *Le Fleming*, 19 C. B. N. S. 687), or a right of shooting (*Hilton* v. *Bowes*, L. R. 1 Q. B. 359).

4. Easements being incorporeal rights, follow the rule which is binding in all other cases of incorporeal rights, and can only be created by deed. Easements cannot be created by parol, or by writing not under seal, except in the case of an Act of Parliament, a custom, or a will (Goddard, ch. ii. s. 1). The same law applies to *profits à prendre* (*Wood* v. *Leadbitter*, 13 M. & W. 838). But an action may be maintained for breach of a written contract for a *profit à prendre* or an easement, though no profit or easement is actually created by the writing (*Smart* v. *Jones*, 15 C. B. N. S. 717).

Easements and *profits à prendre* may be acquired by devise under a will (Goddard, ch. ii. s. 1).

## Tit. IV.

*Ususfructus*, *usus*, and *habitatio* are used by Bracton (220 a) rather in a general than in their technical Roman sense to express the right of a person who had a present as opposed to a reversionary right. They do not correspond to any English technical terms.

*Pr. Ususfructus* is not a servitude, but an estate for life (Austin, lect. l.). The differences between *usus-fructus* and the English estate for life are pointed out in Mr. Campbell's note to that lecture, the chief one being that the *dominus* had a right of entry for certain purposes upon the land held by the *fructuarius;* a reversioner in case of a life estate has no such right unless it is specially granted him (Woodfall, ch. xvi. ss. 3, 9).

The *usufructuarius* might also have an estate for years; in such a case, like the English tenant for years, he was not a *possessor*, or, as we should say, not seised (1 Spence, 208).

*Salva rerum substantia.* See Tit. I. 38. So in English law the tenant for life is answerable for waste, that is, any spoil and destruction which he does or allows to be done to the premises during his tenancy to the injury of the person entitled to the inheritance. Such waste is either *voluntary*, by the tenant's act, or *permissive*, by the tenant's default. If the estate be limited without impeachment of waste, the tenant is only liable for such destructive waste as felling ornamental timber and the like (1 Stephen, bk. ii. pt. i. ch. iv.; Woodfall, ch. xvi. s. 5); and he is allowed to cut timber in a husband-like manner (cf. *quasi bonus paterfamilias* in Tit. I. 38), to open mines, etc. (Williams, R. P., ch. i.).

2. In England there can be no limitation of things *quæ ipso usu consumuntur;* under a specific gift of such things for life or other limited interest, the first taker has the absolute property, unless in the case of stock-in-trade or where personal use by the tenant for life is not contemplated (1 Jarman, ch. xxvi.). As to money, there may be a life interest in the fund, though not in the actual coin (for money has no earmark, 2 Stephen, bk. ii. pt. ii. ch. iv.); and in case of an assignment of the fund to trustees in trust for A for his life, and after his decease in trust for B, the trustees would be compellable to pay the entire income to A for his life, and after his decease to B (Williams, P. P., pt. iv. ch. i.).

3. An estate for life is terminated by (1) the death of the tenant for life; (2) the surrender of the tenant's estate to the person entitled in reversion; (3) the release of the reversion to the tenant for life; (4) forfeiture.

4. "It is a general principle of law, that where a greater estate and a less coincide and meet in one and the same person without any intermediate estate, the less is immediately annihilated, or, in the law phrase, is said to be *merged*, that is, sunk or drowned in the greater" (1 Stephen, bk. ii. pt. i. ch. vii.). See the Jud. Act, 1873, s. 25 (4).

## Tit. V.

*Usus* and *habitatio* are classed by Austin as estates for life, differing from *ususfructus* only in having additional limitations in point of user (lect. l.).

1. The right of *sola vestura terræ*, by which the owner of the land is excluded for the time being from the pasture (Co. Litt., 122 b), may be compared in extent of user with the *usus;* but the person entitled to the *usus* could establish himself (*morari*) upon the land, while the person entitled to *sola vestura* can only enter for the purpose of exercising his right. On the other hand, rights of *sola vestura* can be transferred in gross (*Welcome* v. *Upton*, 6 M. & W. 536), but *usus* was not assignable; it was merely a personal licence. See Williams on Rights of Common, 18.

## Tit. VI.

*Pr.* The conception of possession in both English and Roman law seems to include two necessary elements—a mental one, intention, and a physical one, detention; physical detention coupled with the intention to hold the thing detained as one's own (Maine, ch. viii.). The

difficulties of the subject are well known. Among other authorities the reader is referred to Savigny on Possession; 1 Spence, 33; 1 Stephen, bk. ii. Introd.; 1 Ortolan, Exp., s. 653; Hunter, 195; Maine, ch. viii.; Poste on Gaius, iv. 138; Smith, Dict. Ant., "Possessio;" Markby, ch. viii.; Holmes, lect. vi.; Stephen, C. L., note xvii.; and see note on Bk. IV. Tit. XV. The English view may be found in 3 Reeves, 176 (*per cur.*, 22 Hen. VI.), "If I am seised of a lawful possession and continue peaceably for three years without interruption, I can defend my possession with force against all others;" and in *Rogers* v. *Spence*, 13 M. & W. 581, "These rights of action (*i.e.* for trespass) are given in respect of the immediate and present violation of possession, independently of rights of property. They are an extension of that protection which the law throws round the person." The word "possession" has statutory authority, *e.g.* 15 & 16 Vict. c. 76, s. 168.

The following points of difference may be noticed *inter alia* between the Roman and English law as to possession. They are put forward with some diffidence.

(1) The historical development has been different. The Roman theory of *possessio* seems to have arisen from the difficulties connected with the holding of the *ager publicus*, in which *dominium ex jure Quiritium* could not be acquired; *possessio* therefore originally fell within the *jus honorarium*. In England the Common Law Courts took cognizance of possession from the earliest times, for the fact of possession was regarded as *primâ facie* evidence of seisin in fee (*Asher* v. *Whitlock*, L. R. 1 Q. B. 6, Mellor, J.). The difficulties as to the *ager publicus* were of course unknown in England. The procedure in possessory litigation in the two systems offered many points of similarity. See notes to Bk. IV. Titt. VI., XV.

(2) In Roman law there might be quasi-possession of a servitude. In English law it is not usual to speak of quasi-possession of an easement or *profit à prendre;* Bracton, however, uses the term (52 b).

(3.) In both Roman and English law physical detention is not always necessary (according to some views of the meaning of possession) to constitute possession. There are two cases of constructive possession which are peculiar to English law: (*a*) where possession is given by a deed operating under the Statute of Uses (*Orme's Case*, L. R. 8 C. P. 281); (*b*) in the case of joint-tenants they are said to occupy *per my et per tout*, the meaning of which is that each possessor exercises his right of possession over one part in his own right, while over the other part or parts he has only representative possession (1 Stephen, bk. ii. pt. i. ch. viii.; 7 C. B. 455, note (a)).

(4) The bailee or agent has not possession in Roman law; and to some extent English law agrees (Markby, s. 355); but English common law has always given possessory remedies to bailees (Holmes, lect. vi.). Thus the bailee may bring an action for conversion as well as the bailor; and in indictments for larceny the property is well laid in one who has merely the temporary custody of goods, as the driver of a coach (*R.* v. *Deakin*, 2 Leach, 862). See note to Bk. IV. Tit. I. 14.

(5) A slave or *filiusfamilias* could not have *possessio* (Hunter, 211), except of *castrense* and *quasi-castrense peculium* (Dig. xli. 3, 4, 1); but a son can possess by English law.

(6) The term *possessiones* was used in a concrete sense like the English "possessions," but in a special and technical sense, which would, of course, be quite foreign to the English word. "*Possessiones appellabantur agri late patentes publici privatique qui non manci-*

*patione sed usu tenebantur* (Festus as corrected by 2 Niebuhr, 143. See Livy, vi. 39).

*Usucapio* and *longi temporis possessio* or *præscriptio*, though originally differing (see Hunter, 143; 2 Ortolan, Exp., s. 516), were combined by Justinian, and may be compared with both the prescription and limitation of English law. "By modern jurists the term prescription is used in a general sense, so as to apply either where lapse of time extinguishes the right of the former owner and transfers to the possessor, or where it merely bars the remedy of the former owner against the possessor" (Mackenzie, c. viii.). Savigny (Possession, s. 2) suggests that Justinian might have applied the term *usucapio* to both forms.

As to prescription, the following differences may be noticed between Roman and English law:—(1) None but incorporeal hereditaments can be claimed by prescription in English law; a man cannot by prescription make a title to land (Williams on Rights of Common, 2), nor can all incorporeal hereditaments be claimed by prescription, for a man cannot make a title by prescription to such franchises and liberties as cannot be seized as forfeited before the cause of forfeiture appear on record (Co. Litt., 114 a). (2) Incorporeal rights are acquired in the case of easements in twenty or forty years (in the case of light, twenty years only), in the case of *profits à prendre* in thirty or sixty years, if the hereditaments are such as to fall within the Prescription Act (2 & 3 Will. IV. c. 71); in the case of hereditaments not falling within the Prescription Act by usage from time immemorial; enjoyment for twenty years will in general amount to a presumption that it is immemorial (1 Stephen, bk. ii. pt. i. ch. xxiii.). (3) The *vitia* (see par. 10), which prevented acquisition, are not the same in Roman and English law; thus things belonging to

pupils or persons under twenty-five were incapable of acquisition by *præscriptio* (Cod. vii. 35, 3); but in England the disability of infancy is not taken into account in the computation of the longer periods of forty and sixty years in the Prescription Act (2 & 3 Will. IV. c. 71, s. 7). (4) The fictitious prescription (*quasi-usucapio*) mentioned in Bk. IV. Tit. VI. 3, may be compared with the English fiction of a lost grant or covenant (see the opinion of Bowen, L.J., in *Dalton* v. *Angus*, 6 App. Cas. 779). In Roman law it is the possession, in English law the grant or covenant, that is feigned. (5) Though enjoyment under the Prescription Act must be "as of right" (except in the case of light), an enjoyment generally described as being *nec vi nec clam nec precario* (Goddard, ch. ii. s. 1), still enjoyment in England may be good by prescription, even though it began in trespass, as in the case of a footpath or of a rent (Co. Litt., 114 a), for English law does not require, as did Roman, that the inception of the enjoyment should be under *justus tribulus* or *justa causa* (Markby, 383 a, 402; Poste on Gaius, ii. 15; Sandars on Tit. VI. 10; and see note to Bk. IV. Tit. XV. 4). (6) *Res fisci* (par. 9) could not be acquired by *usucapio*. In England prescription may run against the Crown, as in the case of many franchises (1 Stephen, *ubi supra*).

Limitation, which has been also called negative or extinctive prescription, is regulated in England by various Acts of Parliament. Those relating to land are 3 & 4 Will. IV. c. 27, and 37 & 38 Vict. c. 57, by which no land or rent is recoverable but within twelve years after the right of action accrued to the claimant or some person through whom he claims. The limitation for simple contract debts is six years. The Crown is bound in suits for land by a limitation of sixty years (9 Geo. III. c. 16). The other important statutory

limitations will be found in 3 Stephen, bk. v. ch. ix. The absence beyond seas of a person entitled to an action is now no reason for preventing the running of the Statute of Limitations, as was the case in Roman law (see Bk. IV. Tit. VI. 5; 19 & 20 Vict. c. 97, s. 10; 37 & 38 Vict. c. 57, s. 3); but if any person liable to be sued is, when the cause accrued, beyond seas, he may sue within the same period after the removal of the disability as is allowed to persons having no such impediment (4 Anne, c. 16, s. 19).

Other differences between the Roman and English law will be noticed in the following notes.

1. There may be a right by prescription against the general ecclesiastical law. "The legal right is in the ordinary *primâ facie* to arrange the seats in the church as he thinks best and most in conformity with the rights of the parishioners, but that right may be qualified by a legal prescriptive right, which any of the parishioners may have obtained in derogation of the general right of the ordinary" (Lord Penzance in *Crisp* v. *Martin*, 2 P. D. 24). So a man may prescribe for burial in a particular vault (*Bryan* v. *Whistler*, 8 B. & C. 288). On the other hand, the Statute of Limitations runs against ecclesiastical corporations (see for example, *Ecclesiastical Commissioners* v. *Rowe*, 5 App. Cas. 736).

*Bona fides* is a term often used in English law, but in a sense different from that which it had in Roman law. In the latter, it is always used in a defined and technical sense—the *bonæ fidei possessor* or the *bonæ fidei actio* must fulfil certain conditions; but in England, the term is used much more generally, as may be seen, for instance, by referring to such a case as *Pease* v. *Chaytor*, 32 L. J. M. C. 121, or such a statute as 13 Eliz. c. 5. Again, *bona fides* is a necessary element in the acquisi-

tion of ownership by *usucapio* (Sandars on par. 10); but this, though necessary to some extent in the acquisition of an incorporeal hereditament by prescription, is not so to such an extent as in Roman law (see p. 67). The term is used by Bracton in a sense more approaching its Roman than its English use. Thus, he calls *emptiones, venditiones*, etc., *contractus bonæ fidei* (100 b).

3. The law as to stolen goods in England seems to be shortly this: The property in money, bank-notes, and negotiable instruments passes by delivery, and a person taking any one of these *bonâ fide* and for value is entitled to retain it as against a former owner from whom it has been stolen (*Miller* v. *Race*, and notes thereon in 1 Smith, L. C.). In the case of other goods, a *bonâ fide* purchaser of stolen goods in market overt obtains a good title, provided that the thief has not been convicted, for after conviction of the thief the propert revests in the owner (24 & 25 Vict. c. 96, s. 100), except in the case of a trustee, banker, etc., convicted of fraudulently dealing with goods or documents of title to goods entrusted to him (*ibid.*). The goods must then be recovered from the person in whose hands they are at the time of the conviction of the thief, for any sales and resales, if the first sale was in market overt, before the conviction of the thief, pass the property (*Horwood* v. *Smith*, 2 T. R. 750; *Cundy* v. *Lindsay*, 3 App. Cas. 459). If the goods were obtained by false pretences and not larceny, the question then is whether the property in the goods has passed or not, and the answer to that question depends upon the nature of the false pretences employed. Thus, in *Cundy* v. *Lindsay* the false pretences were such that the property did not pass, and the owner recovered the value of his goods from a *bonâ fide* purchaser, who had sold them to a third person before the conviction of the thief. In *Moyce* v. *Newington*,

4 Q. B. D. 32, the property passed, although false pretences were used, and the owner could not recover against a *bonâ fide* purchaser. In the former of these cases there had been no sale in market overt, in the latter there had been such a sale, but the question of market overt was of no importance, as there had been a conviction. For market overt, see 2 Stephen, bk. ii. pt. ii. ch. v.; Benjamin, bk. i. pt. i. ch. i. A sale by sample is not a sale in market overt (*Crane* v. *London Dock Co.*, 5 B. & S. 313). As to the passing of the property, the law is, that if a vendee obtains possession of a chattel with the intention by the vendor to transfer both the property and the possession, although there has been fraud on the part of the vendee, the property vests in the vendee until the vendor has done some act to disaffirm the transaction (*Kingsford* v. *Merry*, 11 Exch. 577). There has been some doubt as to how far the owner is entitled to sue for his property in the case of goods stolen or obtained by false pretences before the thief has been prosecuted to conviction. The law and authorities will be found in *Midland Insurance Co.* v. *Smith*, 6 Q. B. D. 561; and see note on Bk. IV. Tit. I.

5. So in English law a *mens rea* is necessary before a man can be convicted of larceny. If he believe that he has a right to the goods there can be no larceny, even if the goods be taken by force, because though the seizure be wrongful, the intent to steal is wanting (2 East P. C. 259). Thus, in order to constitute a larceny of lost goods, there must be a felenious intent at the time of the finding, coupled with reasonable means at the same time of knowing the owner (*Reg.* v. *Glyde*, L. R. 1 C. C. R. 139). The doctrine that *mens rea* is necessary in order to constitute a criminal act is subject to some exceptions. Thus, it has been held not necessary in the case of abduction (*Reg.* v. *Prince*, L. R. 2 C. C. R. 154), and

receiving lunatics in an unlicensed house (*Reg.* v. *Bishop*, 5 Q. B. D. 259). So a man may be convicted of an offence, although he acted under a claim of right, if the alleged right be impossible in law, as in *Reece* v. *Miller*, 8 Q. B. D. 627.

6. In addition to the case of goods stolen or obtained by false pretences, property may be transferred in other ways by a person having no title to it. This may happen, for instance, in the case of an agent entrusted with goods, who may confer upon a *bonâ fide* purchaser a greater right than he himself possesses (40 & 41 Vict. c. 39). So in the case of pledge. See Tit. VIII. 1.

In English law larceny cannot be committed at common law of things which savour of the realty, and are at the time they are taken a part of the freehold (2 Russell on Crimes, bk. iv. ch. i. s. i.); but by statute, larceny may be committed of lead, etc., attached to buildings, title deeds, and other matters not the subject of larceny at common law (24 & 25 Vict. c. 96).

For general or special occupancy in the case of an estate *pur autre vie*, see note to Tit. I. 39.

9, 10. See pp. 66, 67.

12. Where a continuous possession of twelve years can be made up of the possession of the party actually in possession, and the possession of his predecessors whom he has succeeded as heir, purchaser, devisee, etc., the tendency of English decisions is to recognize his ownership, but to refuse it to the last of a series of persons who are strangers to one another (Markby, 390).

## Tit. VII.

1. The English law as to *donationes mortis causa* is based upon the Roman law, and agrees with it (2 Stephen, bk. ii. pt. ii. ch. iv.). The latest case upon the subject is *Re Mead*, 15 Ch. D. 651. See Chalmers on Bills of Exchange, Art. 262.

2. For delivery, see Tit. I. 40. It will be noticed that the Roman law is not that the property passes by the intention, as seems to be the case in English law (Tit. I. 40, 44), but that the donee has a right to require the donor to deliver the chattel to him. Compare with this the equitable right of an English purchaser to a conveyance of real property in accordance with the contract. No registration of gifts in England is necessary, but no doubt a voluntary settlement of land might be registered under the Land Transfer Act, 1875 (38 & 39 Vict. c. 87, s. 33). It is almost needless to state that a gift cannot be revoked in England for any such reason as that given in the last sentence of this paragraph.

3. The *donatio ante nuptias* or *propter nuptias* corresponds to some extent to the marriage settlement of English law. It did not take effect unless the marriage followed. So in England the settlement is null and void if the marriage do not take place (*Thomas* v. *Brennan*, 15 L. J. Ch. 420), or if the marriage is not a valid and effectual one, as if it be celebrated between persons within the prohibited degrees of affinity (*Chapman* v. *Bradley*, 33 Beav. 61). There is a considerable difference in the position of settlements made before and after marriage, as regards the rights of creditors, a difference which does not seem to have existed in Roman law. As marriage is the highest and most

valuable of considerations, settlements made in contemplation of marriage are favoured accordingly. But if the celebration of the marriage is part of a scheme to defraud creditors, the consideration of marriage cannot support even an ante-nuptial settlement (*Bulmer* v. *Hunter*, L. R. 8 Eq. 46). A post-nuptial voluntary settlement is within 13 Eliz. c. 5 and 27 Eliz. c. 4, and void against creditors and subsequent purchasers for value, even with notice. But a *bonâ fide* post-nuptial settlement will be supported on very slight consideration, as in *Hewison* v. *Negus*, 15 Beav. 408. With regard to settlements made by traders, the Bankruptcy Act, 1869 (32 & 33 Vict. c. 71, s. 91), enacts that a covenant or contract made by a trader in consideration of marriage for the future settlement upon his wife or children of any property wherein he had not at the date of the marriage any estate or interest, and not being property of or in right of his wife, is, upon his becoming bankrupt before actual transfer of such property, void as against his trustee in bankruptcy. And any settlement made by a trader, not being a settlement made before or in consideration of marriage, or made in favour of a purchaser or incumbrancer in good faith and for valuable consideration, or a settlement made on or for the wife and children of the settlor of property which has accrued to the settlor after marriage in right of his wife, is void as against the trustee if the settlor becomes bankrupt within two years after the date of the settlement, and is also void if the settlor becomes bankrupt within ten years, unless the parties claiming under the settlement can prove that the settlor could at the date of the settlement pay his debts without the aid of the settled property. See notes to *Twyne's Case*, 1 Smith, L. C.; 3 Davidson, pt. i. App. iv.

4. The term *jus accrescendi* is adopted by English law to express the right of survivorship which exists in the case of joint tenancy. It is so used in Co. Litt., 181 a, and applies to personal as well as real property (2 Stephen, bk. ii. pt. ii. ch. i.). See also the judgment of the House of Lords in *Carlton* v. *Thomson*, L. R. 1 H. L. Sc. 232.

## Tit. VIII.

*Pr.* English examples of the law in the first sentence of this paragraph may be found in the restraint upon anticipation which is allowed in the case of a married woman, contrary to the general rule which forbids restraint to be laid upon alienation (Williams, R. P., pt. i. ch. xi.), and in the alienation by a factor of property of which he is not owner, so as to give a good title to a *bonâ fide* purchaser. See note to Tit. VI. 6.

"Dower is called in Latin by the foreign jurists *doarium*, but by Bracton and our English writers *dos*, which among the Romans signified the marriage portion which the wife brought to her husband, but with us is implied to signify this kind of estate to which the civil law in its original state had nothing that bore a resemblance" (1Stephen, bk. ii. pt. i. ch. iv.). *Dos* corresponds to property brought into settlement by the wife, and not to dower in the modern sense of the word. *Dos* and dower probably both arose originally from a similar feeling—the duty of providing sustenance for the wife apart from any property brought into the nuptial fund by the husband. See Maine, Early History of Institutions, lect. xi. The rights of a husband in the wife's property brought into settlement depend entirely upon

the terms of the settlement. The rights of the husband over the unsettled property of the wife scarcely fall within the scope of this paragraph. They are of very little importance since the Married Women's Property Act, 1882.

1. The English contract of pawn or pledge, called *vadium* by Lord Holt in his judgment in *Coggs* v. *Bernard*, 1 Smith, L. C., *pignori acceptum* by Sir William Jones in his treatise on Bailments, agrees in most respects with the Roman law. A pledge, like a lien, necessarily implies possession on the part of the pledgee, differing in this respect from a mortgage, where the mortgagee may or may not be in possession. It also implies property; that is to say, there is an implied undertaking by the pledgor that the property pledged is his own (*Singer Manufacturing Co.* v. *Clark*, 5 Ex. D. 37).

A pledgee by English law has the right of selling goods pledged to him if the pledgor make default in payment at the stipulated time (Benjamin, bk. i. ch. i.). If the pledgor in fraud of the pledgee parts with the goods to a third person *bonâ fide* and for valuable consideration, an action will not lie by the pledgee to recover the goods or their value from such third person (*Babcock* v. *Lawson*, 5 Q. B. D. 284). In the case of a wrongful sale by a pledgee, the pledgor cannot recover the value of the pledge without a tender of the amount due (*Halliday* v. *Holgate*, L. R. 3 Exch. 299). The same rules apply to the pledge of a chose in action (*France* v. *Clark*, 22 Ch. D. 830).

Pledge is used in English law only with regard to personal property. A pledge of real property is called a mortgage, and where the mortgagee is in possession would correspond to the *pignus*, where the mortgagor is in possession to the *hypotheca* of Roman law, for which

see Bk. IV. Tit. VI. 7. The word mortgage is used, too, of personal property; such mortgages must, as a rule, be registered under the Bills of Sale Acts, 1878 and 1882. "There are three kinds of security," says Willes, J., in *Halliday* v. *Holgate*: "the first, a simple lien; the second, a mortgage passing the property out and out; the third, a security intermediate between a lien and a mortgage, viz. a pledge, where by contract a deposit of goods is made a security for a debt, and the right to the property vests in the pledgee so far as is necessary to secure the debt."

The power of the creditor to sell the thing pledged in Roman law was so necessary a part of his rights that even an agreement *ne vendere liceat* had no other effect than to make it necessary for the creditor to give notice of his intention before selling (Dig. xiii. 7, 4–6). An instance, somewhat similar, of such interference with the agreement of the parties, is to be found in English law, in the rule that in the case of a mortgage the mortgagor cannot deprive himself of his equity of redemption (Williams, R. P., pt. iv. ch. ii.).

The case of pledges with pawnbrokers is dealt with in a special manner in English law. The present statute governing the relations of pawnbroker and customer is the Pawnbrokers Act, 1872 (35 & 36 Vict. c. 93). For pledges by factors, see Tit. VI. 6, note.

## Tit. IX.

*Pr.* None of these cases could arise in England owing to the absence of slavery and *patria potestas*. In England, ownership may be acquired through another person in some cases, *e.g.* where the person acquiring is an agent

or a trustee. In these cases the acquisition may be for the benefit of the principal or the *cestui que trust.* See note to Bk. III. Tit. XXVIII.

1. An infant may hold property in England. This is obvious from the fact that he may do many acts which could only be done by an owner. He may present to an advowson (Co. Litt., 172 b), may alien an estate in gavelkind at fifteen (1 Stephen, bk. ii. pt. i. ch. ii.), may sue for wages in the County Court (9 & 10 Vict. c. 95, s. 64), may succeed as heir-at-law, and has the property in necessaries, for he may be sued for them. He may take or accept anything by will, purchase, surrender, or otherwise, but is not bound to take property if it would be to his disadvantage to do so. An infant cannot be a trustee, for the presumption is that a gift to him is for his own benefit (Simpson, ch. vi.), therefore the Court will appoint a new trustee in place of an infant trustee (*Re Shelmerdine*, 33 L. J. Ch. 474). Though he may accept a grant, he can avoid or confirm it on attaining twenty-one (Bac. Abr. Infant, F).

## Tit. X.

Besides many other differences between the Roman and English will, which will be mentioned in the notes upon the succeeding Titles, it may be noticed that—

(1) There is a distinction in England, which did not exist at Rome, between the powers of a court of probate and a court of construction. Thus, in the court of construction, an unrevoked probate cannot be impeached by evidence even of fraud (*Allen* v. *Macpherson*, 1 H. L. C. 191). It has been held since the Judicature Acts that a judge of the Chancery Division has juris-

diction to grant probate, but that it would not be using a sound discretion to exercise such jurisdiction (*Pinney* v. *Hunt*, 6 Ch. D. 98).

(2) There is nothing corresponding to *jus tripertitum* in England; the formalities relating to wills are now practically entirely governed by statutes, the chief of which is the Wills Act of 1837 (1 Vict. c. 26).

(3) The formalities necessary by English law cannot be dispensed with, except in the case of soldiers and sailors (see on Tit. XI.); but in Rome, in case of a pestilence, of a will made in rural districts, and of a holograph will solely for the benefit of descendants, more freedom was allowed (Mackenzie, pt. iv. ch. ii. s. i.). In England, though a will itself cannot be made by parol since the Wills Act, still, if a will has been lost, the contents of it may be proved, like those of any other lost document, by secondary evidence (*Sugden* v. *Lord St. Leonards*, 1 P. D. 154); but the secondary evidence must establish, as in that case, that a duly executed will once existed.

3. Wills in English law may be divided into four classes: (1) wills of realty made before 1838; (2) wills of realty made after 1838; (3) wills of personalty made before 1838; (4) wills of personalty made after 1838.

By the Statute of Frauds (29 Car. II. c. 3, s. 5) wills of realty required to be attested and subscribed in the presence of the devisor by three or four credible witnesses. Wills of personalty might be made even orally, when they were called nuncupative wills, and were subject to such restrictions by s. 19 of the Statute of Frauds, as practically abolished them. A will of personalty reduced into writing was sufficient, though it had not been signed or even seen by the testator, *à fortiori* if it had no witnesses. A male at fourteen and a female at twelve could make a will of personalty.

Copyholds were well devised by any instrument which was sufficient for the disposition of personalty (Jarman, ch. vi.).

By the Wills Act, 1837 (1 Vict. c. 26, s. 9), two or more witnesses are required for the attestation of every will, whether of real or personal estate, made since the 1st of January, 1838; the witnesses are to be present at the same time, and to attest and subscribe the will in the presence of the testator, but no form of attestation is necessary. The will is not void on account of the incompetency of the attesting witnesses (s. 14). A gift to a witness, or the husband or wife of a witness, is void, but such person is a good witness (s. 15). A creditor (s. 16) or executor (s. 17) is a good witness.

No sealing is necessary by English law, and sealing without signature would be an insufficient execution (1 Williams, Ex., pt. i. bk. ii. ch. ii.). Where in the witnessing clause the testator stated that he had set his hand and seal to the will, tearing off the seal has been held to be a sufficient revocation, if done with the intention of revoking (*Price* v. *Powell*, 3 H. & N. 341). For sealing a will made under a power, see *Smith* v. *Adkins*, L. R. 14 Eq. 402; Wills Act, s. 10.

6. By 1 Vict. c. 26, all personal qualifications in regard to witnesses are expressly dispensed with. Women, infants, and persons of infamous character, as criminals, are good witnesses (for the Wills Act does not, like the Statute of Frauds, require *credible* witnesses). It is questionable whether idiots or lunatics are good witnesses, but the question is not very important, as testators do not, as a rule, make choice of such persons (1 Jarman, ch. vi.); still they are not expressly excluded, as in Roman law.

With this disability of women in Roman law compare their disability in old English law as witnesses to prove

a man to be a villein, *mulieres ad probationem status hominis admitti non debent* (Co. Litt., 6 b).

11. See note to par. 3. In England, a devisee or legatee may be an attesting witness, but the gift to an attesting witness, or the husband or wife of one, is void. A trustee under the will is a good witness, provided that he takes no benefit.

12. A will, though usually written on paper, may be good if written on other substances. Thus, a deed-poll or an indenture may have a testamentary operation (1 Jarman, ch. ii.). The validity of such dispositions of course depends upon their fulfilling the conditions necessary for the validity of wills (*Re Patterson*, 32 L. J. Ch. 596). A will may be written in pencil (*Bateman* v. *Pennington*, 3 Moo. P. C. 223).

13. "Sometimes a testator for greater security executes his will in duplicate, retaining one part and committing the other to the custody of another person (usually an executor or trustee); and questions have not unfrequently arisen as to the effect of his subsequently destroying one of such papers, leaving the duplicate entire. In these cases the presumption generally is that the testator means by the destruction of one part to revoke the will, but the strength of the presumption depends much upon circumstances" (1 Jarman, ch. vii.).

## Tit. XI.

By s. 11 of the Wills Act, any soldier being in actual military service, or any mariner or seaman being at sea, may dispose of his personal estate as he might have done before the Act. As to seamen and marines, the

later Act (28 & 29 Vict. c. 72) alters this; but as to soldiers, the law depends on Acts previous to the Wills Act, viz. 26 Geo. III. c. 63; 32 Geo. III. c. 34, s. 1; 11 Geo. IV. c. 20, ss. 48–50; and 2 & 3 Will. IV. c. 40, ss. 14, 15). The privilege attaches only to (1) wills of personalty, (2) soldiers on active service, so not to soldiers quartered in barracks at home or abroad. See Theobald on Wills, 51, for the cases on the subject. In certain cases money may be paid over to the representatives of soldiers without probate (see 1 Williams, Ex., pt. i. bk. v. ch. ii. s. iv.). The Roman military testament agreed with the English will in one respect in which the ordinary Roman will did not—it was not subject to the *lex Falcidia* (Dig. xxxv. 2, 17).

## Tit. XII.

The incapacities of testators are to some extent the same, and to some extent different in Roman and English law. The incapacitated persons may thus be classed in Roman law: (1) persons *in potestate;* (2) *impuberes;* (3) *furiosi;* (4) *prodigi;* (5) deaf and dumb persons; (6) blind persons, unless under the restrictions enacted by Cod. vi. 22, 8; (7) prisoners of war. In English law the classification stands thus: (1) alien enemies; (2) infants (Wills Act, s. 7); (3) idiots, except during lucid intervals; (4) deaf and dumb persons, who are presumed incapable, but their capacity may be proved; (5) lunatics, except during lucid intervals—the capacity of the testator at the date of the will being decided by a jury in case of realty, by a judge of the Probate Division in case of personalty; (6) married women (Wills Act, s. 8), unless in the case of the queen

consort, property belonging to the woman for her separate use, or property held as executrix, or unless the will was assented to by the husband or was made in pursuance of an agreement before marriage or by virtue of a power. See now the Married Women's Property Act, 1882, s. 1 (1).

(1), (4), (6), and (7) of the Roman law are peculiar to it; (1) of the English law could scarcely arise in Roman law; (6) is peculiar to English law. The persons included under the classes of *impuberes* and infants of course only nominally correspond; and as to prisoners of war, English law invests them with privileges rather than disabilities, for by 11 Geo. IV. c. 20, s. 49, seamen and marines while prisoners of war can make wills which will be good without the usual formalities. See on the subject of this Title 1 Williams, Ex., pt. i. bk. ii. ch. i.; 1 Jarman, ch. iii.

## Tit. XIII.

The law of this Title has no counterpart in England. It is, however, a well-known maxim in English law, that an heir-at-law can only be disinherited by express devise or necessary implication (1 Jarman, ch. xvii.).

1. As in English law a will speaks from the death of the testator, subsequent birth of a child does not avoid the will. For the meaning of *postumus*, see Bk. I. Tit. XIII. 4.

## Tit. XIV.

*Pr.* There is no person in English law to whom the *universitas juris* of the testator descends as it did to the

*heres*. The executor represents the *heres*, as far as regards personalty; but there is in the case of realty no person clothed with such powers, for the testator cannot appoint an heir. *Solus Deus heredem facit* (Bracton, 62 b). In fact, the *heres* partakes of the nature of heir, devisee, executor, administrator, and legatee. He represents the *persona* of the testator, and in England all these (for an executor and administrator of the same estate, though not of the same goods, can exist together), or any less number, may, according to circumstances, represent the *persona* of the testator.

The Roman will was invalid if no *heres* was instituted (Tit. XXIII. 2), but an English will of personalty is good though no executor is named. In such a case the testator is said to die *quasi-intestatus*, and administration with the will annexed is granted by the Court. In Roman law *bonorum possessio secundum tabulas* might be granted where the will was defective in some points (see Sandars on Bk. III. Tit. IX. 3), but not if it contained no nomination of a *heres*. In the older English law the appointment of an executor was essential to a will of personalty, but this rule has long ceased to exist (1 Williams, Ex., pt. i. bk. i. ch. ii.).

5. A testator in England may die partly testate and partly intestate. A partial intestacy may occur where (1) the deceased disposes of only part of his property; (2) the deceased appoints no executor; (3) the appointment of executor fails by (a) refusal of the person appointed, (b) death of the person appointed before the testator or before proving the will, (c) death of the executor intestate before he has administered all the personal estate of the deceased. In cases (2) and (3) administration with the will annexed (called also in case (c) administration *de bonis non*) must be granted. Of course in case (1) ordinary general administration

must be taken to the goods of the deceased not disposed of by will, in the case of personalty; in the case of realty the property undisposed of will pass to the heir-at-law. See 1 Williams, Ex., pt. i. bk. v. ch. iii.; and for a recent case, *Jones* v. *Robinson*, 3 C. P. D. 344, where the words of the will were not sufficient to pass the real estate, as to which there was an intestacy.

10. In English law, in the case of a condition impossible *ab initio* in a devise of realty, if precedent, the gift fails, if subsequent the gift is absolute; in a bequest of personalty, whether the condition be precedent or subsequent, the gift is absolute, except where a condition precedent involves *malum in se*, or is the sole motive of the gift, in which case the gift is void. In the case of conditions *becoming* impossible, the rule is the same as regards both realty and personalty, viz. if precedent the gift fails, if subsequent the gift is absolute (2 Jarman, ch. xxvii.).

11, 12. English law agrees. And in English, as in Roman law, the person corresponding to the *heres* must be capable of being determined. Compare the Roman rule, *Incerta persona heres institui non potest* (Ulp. Reg. 22, 4), with the case of *Lowndes* v. *Stone*, 4 Ves. 649, where a bequest to "my next of kin or heir-at-law, whom I appoint my executor," was held void.

## Tit. XV.

*Pr.* A testator may appoint several persons as executors in several degrees, as where he makes his wife executrix, but if she will not or cannot be executrix, then he makes his son executor; and if his son will not or cannot be executor, then he makes his brother, and

so on: in which case the wife is said to be instituted executor in the first degree, the son in the second degree, and so on. So B may be nominated in substitution for A in case A die in the testator's lifetime (1 Williams, Ex., pt. i. bk. iii. ch. ii.). In the case of legacies, a substitute may be provided to take in case of the legatee dying in the testator's lifetime. The question arises most frequently in the case of a gift to A "*or* his representatives" (or similar words), in which case the gift is usually substitutional; but it is otherwise if the gift is to A *and* his representatives, for in such a case the gift usually lapses (*Elliott* v. *Davenport*, 1 P. Wms. 83; 2 Williams, Ex., pt. iii. bk. iii. ch. ii. ss. 2, 5). There may also be substitution in case of a devise (2 Jarman, ch. xlix.), or of estates tail in settlement. In the case of an administrator, although limited administration (as *pendente lite*, *durante minore ætate*) may be granted, and afterwards another administrator substituted in place of the temporary one, such substituted administrator is simply the officer of the Court, and in no way resembles the *heres substitutus* of this Title.

1. An example of substitution of several for one in English law is seen in the case of A or his representatives above. An example of reciprocal (*in vicem*) substitution of executors will be found in *In the Goods of Deichman*, 3 Curt. 123.

## Tit. XVI.

*Pr.* A parent cannot by English law make a will on behalf of his infant child.

3. With this paragraph compare the curious case of *Pelham* v. *Newton*, 2 Cas. *temp.* Lee 46, where a testa-

trix directed her executors to deliver up certain parcels sealed up to the persons to whom they were directed; but Sir George Lee was of opinion that they could not safely do so, and directed them to be opened in the presence of the Registrar. A schedule of the contents was made, and probate granted of the schedule and the will. As a general rule, the whole will must be proved without reservation, but in certain cases (as of partial incapacity of the testator, scurrilous language, etc.) part may be admitted to probate and part rejected (1 Williams, Ex., pt. i. bk. ii. ch. i. s. 1; bk. iv. ch. ii. s. 7). It is probable that a clause forbidding part of the will to be opened during the lifetime of a son, as in this paragraph, would be invalid in English law.

## Tit. XVII.

*Pr.* A Roman will was revoked (*ruptum*) or became inoperative (*irritum*) by (1) a subsequent will, (2) cancellation or destruction with the intention of revocation, (3) birth or adoption of a *suus heres*, (4) *capitis deminutio*, (5) refusal by the instituted *heres* of his office, (6) judicial sentence for non-compliance with the rules indispensable to its validity, as the number of witnesses or the institution of a *heres* (Mackenzie, pt. iv. ch. v.).

As a general rule, a will in English law, being regarded as ambulatory until the death of the testator, is revocable in spite of the strongest and most express terms in it making it irrevocable, unless indeed, as in *Loffus* v. *Maw*, 3 Giff. 592, a legatee has been induced by the terms of the will to render valuable services to the testator. A will since the Wills Act is revoked by (1) marriage (s. 18); (2) another will or codicil duly

executed (s. 20); (3) some writing declaring an intention to revoke the will and duly executed as a will (*ibid.*); (4) the burning, tearing, or otherwise destroying the will by the testator, or by some person in his presence and by his direction, with the intention of revoking the same. It becomes inoperative, as in Roman law, by non-compliance with legal rules. As to revocation by destruction, etc., of wills made before 1838, the old law is now of little importance, as it has been held by the Privy Council that a will made before 1838 and revoked since must be revoked in compliance with the new law (*Croker* v. *Marquess of Hertford*, 4 Moo. P. C. 356). For revocation by a subsequent will of a will made before 1838, see 1 Jarman, ch. vii. s. 5. Marriage alone did not revoke a will made before 1838, except in the case of a woman; in the case of a man marriage and the birth of issue were necessary (1 Jarman, ch. vii. s. 1). Compare with this (3) of the Roman law above. There were two modes of revocation before the Wills Act which no longer exist, viz. by alteration of estate and by subsequent void conveyance (see 1 Jarman, ch. vii. ss. 3, 4). It will be seen that destruction, a subsequent will, and a judicial sentence are modes of avoiding a will common to all three periods, Roman law, English law before 1838, and English law since 1838.

7. So in English law mere intention without anything more is an insufficient revocation. See Wills Act, s. 19.

8. The king may be executor in England. Thus Katherine, queen of Henry V., appointed her son Henry VI. her executor, and he appointed certain persons to execute the will (4 Inst. 335). The Crown may take by devise or bequest, and may be a trustee under a will, but great doubts have been entertained whether the subject can by any legal means enforce

such a trust (Lewin, ch. iii. s. 2; *Rustomjee* v. *Reg.*, 2 Q. B. D. 69).

With the concluding sentence of this paragraph compare what is said in the year-book 19 Hen. VI. 63, "*La ley est le plus haute inhéritance que le roy ad; car par la ley il même et touts ses sujets sont rulés, et si la ley ne fuit, nul roy et nul inhéritance sera,*" and other authorities quoted in 2 Stephen, bk. iv. pt. i. ch. ii.

## Tit. XVIII.

Though the heir or next of kin may be totally omitted in a will, the law of England admits no *querela* to set aside such a will. Formerly the Court of Probate required evidence of full and entire capacity in a will which was not consonant with the testator's natural affection and moral duties, and where the capacity was at all doubtful and the will "inofficious," it has been said that there ought to be direct proof of instructions. But the modern doctrine only requires that there should be satisfactory proof of some kind of the testator's knowledge and approval of the contents of the will (1 Williams, Ex., pt. i. bk. ii. ch. i. s. 1). The Roman rule is not necessary in a system where, as in England, a son can hold property of his own, and where there is no *patria potestas*.

## Tit. XIX.

2, 7. The heir in English law cannot disclaim, as his title devolves upon him by act of the law instantly upon

the death of the ancestor (Williams, R. P., pt. i. ch. iii.). A devisee (Williams, R. P., pt. i. ch. x.) or legatee may disclaim any benefit accruing to him under a will. An executor may renounce his office, even if in the lifetime of the testator he has agreed to accept it. By 21 & 22 Vict. c. 95, s. 16, an executor dying without having taken probate, or not appearing to a citation to take probate, is to be treated as if he had renounced. Though the executor has his election whether to accept or refuse, he may determine such election by acts amounting to administration. He may renounce after taking the oath as executor, but not after he has taken probate. By 20 & 21 Vict. c. 77, s. 79, the rights of an executor renouncing probate are to cease as if he had not been named in the will (1 Williams, Ex., pt. i. bk. iii. ch. vi. s. 2).

The time allowed to the executor to deliberate whether he will accept or refuse is not, as in the case of the *heres*, fixed by law, but is left to the discretion of the judge (Williams, Ex., *ubi supra*). If the executor administer, he will, by 55 Geo. III. c. 184, s. 37, be liable to a penalty if he omit to take probate within six months.

5. In English law, "if one who is neither executor nor administrator intermeddles with the goods of the deceased, or does any other act characteristic of the office of executor, he thereby makes himself what is called in the law an executor of his own wrong, or, more usually, an executor *de son tort*" (1 Williams, Ex., pt. i. bk. iii. ch. x.). But mere offices of kindness and charity will not constitute a man executor *de son tort*. An executor *de son tort* has all the liabilities, though none of the privileges, that belong to the character of executor (*Carmichael* v. *Carmichael*, 2 Phill. 103). All lawful acts done by an executor *de son tort* are good (*Coulter's Case*, 5 Rep.

30 b); his acts are good against the true representative only where lawful and such as the true representative was bound to perform in the ordinary course of administration (*Buckley* v. *Barber*, 6 Exch. 164).

6. This privilege, called the *beneficium inventarii*, may be compared with the English law, that an heir or executor is not liable beyond the assets of the deceased coming into his hands (1 Stephen, bk. ii. pt. i. ch. xi.; 2 Stephen, bk. ii. pt. ii. ch. vii.). It is the duty of the executor to make an inventory of all the goods and chattels of the testator (*ibid.*).

## Tit. XX.

1. A legacy (which is used only of a bequest of personalty) is defined to be "some particular thing or things given or left, either by a testator in his testament wherein an executor is appointed, to be paid or performed by his executor, or by an intestate in a codicil or last will wherein no executor is appointed, to be paid or performed by an administrator" (2 Williams, Ex., pt. iii. bk. iii. Introd.)

2. As to an action for legacies, before the Judicature Acts a legacy could not be recovered by action at law, unless in the case of a specific legacy assented to by the executor. How far since the Jud. Acts the Queen's Bench Division can entertain an action for a legacy may be a question. The jurisdiction in such cases is not one of those specifically assigned to the Chancery Division by Jud. Act, 1873, s. 34, except where the claim arises in administration. The Probate Division, it is presumed, cannot take cognizance of such an action, for by 20 & 21 Vict. c. 77, s. 23, the Court of Probate

was not to entertain suits for legacies. Legacies may be recovered by suit in the County Court where the estate to be administered does not exceed £500 (28 & 29 Vict. c. 99, s. 1).

3. It may be useful to collect here some of the differences between the Roman *legata* and English legacies.

(1) *Legatum* was used for a bequest of either realty or personalty; legacy can only be used of realty if there is nothing else to which it can refer (Theobald on Wills, 152).

(2) Without a *heres* there could be no *legatum*; but a legacy may be good, although there be no executor.

(3) The person in general bound to pay the *legatum* was the *heres*, but legatees and debtors might also be burdened with a *legatum*; a legacy can be recovered only from the executor or administrator with limited powers (as *cum testamento annexo*) representing him.

(4) *Legatum* of another person's property is good; it is otherwise with a legacy.

(5) *Legatum* might be created by (a) will, (b) letter, (c) *codicillus*; legacy can be created by will only.

(6) *Legatum* was not a direct bequest, as in English law, but an injunction to the *heres* to pay over part of the property to the legatee.

(7) *Legata* were only good so far as they did not transgress the *lex Falcidia*, by which a testator was forbidden to dispose of more than three-fourths of the inheritance in *legata* (Tit. XXII.); but an English testator may dispose of the whole of his property in devise and legacy.

(8) The legatee was owner of a specific *legatum*, but had only the right that the *heres* should deliver him the ownership in a general *legatum*; probably in English law the property in a specific and general legacy is of

the same nature, unless indeed the difference of remedy mentioned in the previous note points to a difference in the nature of the right.

See note to Tit. XXIII. for *fideicommissa*, which differed only from *legata* in the words by which they were created (Sandars on Tit. XX. 3).

5. The English law is the same in the case of a pledge of chattels. Where a testator pawns or pledges an article specifically bequeathed, a right of redemption is left in him and passes to the legatee at his death, so as to enable him to call upon the executor to redeem and deliver it to him (2 Williams, Ex., pt. iii. bk. iii. ch. iii. s. 1. See also par. 12). If the executor fails to perform this duty, the legatee is entitled to compensation (*Bothamley* v. *Sherson*, L. R. 20 Eq. 304).

7. By s. 4 of the Wills Act, the testamentary powers conferred by the Act apply "to all contingent, executory, or other future interests in any real or personal estate."

8. A devise or bequest to two or more persons simply makes the devisees or legatees joint tenants. But if property be given to A, and B his wife, and C (a third person), A and B will take one moiety, and C the other. And expressions importing division by equal or unequal shares, or referring to the donees as owners of respective or distinct interest, or even words simply denoting equality (as "equally to be divided"), operate to create a tenancy in common. In the case of joint tenancy the right of survivorship attaches, but not in the case of tenancy in common. In the case of joint tenants, if the devise or bequest fail as to one of the donees from its being originally void, or subsequently revoked, or from the decease of the devisee in the testator's lifetime, the survivor or survivors take the whole. It is otherwise in the case of tenants in

common, in the case of whom there is no *jus accrescendi* (2 Jarman, ch. xxxii.).

10. The law seems to be the same in England, for the power of testamentary disposition extends only to such interests in real or personal estate as would at the death of the testator, if not so disposed of, devolve to his general real or personal representatives (1 Jarman, ch. iv.). The doctrine of election has a certain bearing upon the Roman law of this paragraph. The doctrine is thus stated in 1 Jarman, ch. xiv.: "If a testator has affected to dispose of property which is not his own and has given a benefit to the person to whom that property belongs, the devisee or legatee accepting the benefit so given to him must make good the testator's attempted disposition; but if, on the contrary, he choose to enforce his proprietary rights against the testator's disposition, equity will sequester the property given to him, for the purpose of making satisfaction out of it to the person whom he has disappointed by the assertion of those rights." See also notes to *Streatfield* v. *Streatfield*, 1 White and Tudor, L. C. This doctrine is generally supposed to be based upon various passages in the Institutes and Digest of the Institutes, besides these paragraphs, Tit. XX. 4 and XXIV. 1. For the other passages, see Mr. Swanston's note to *Dillon* v. *Parker*, 1 Swanst. 394. The only other case in which an English will can have any disposing power over what is not the testator's property, seems to be where he makes a disposition of land or goods not his property at the time of the will, but which he may acquire by purchase or otherwise before his death. As the will speaks from the death of the testator, such disposition would be good. So if a man devise all his lands in the parish of A, the fact of his having at the date of the will no lands in that parish is quite consistent with an

intention to purchase land in that parish, so as to satisfy the terms of the devise (1 Jarman, ch. xiii.).

12. In the case of a devise, a conveyance of the devised property renders the devise inoperative. Where the testator contracts to sell the devised estate and dies without having executed a conveyance, the devisee takes the legal estate only, and the purchase money becomes part of the general personal estate (1 Jarman, ch. vii. s. 3). With regard to legacies, a specific legacy is revoked by the testator's disposing of it in his lifetime, or changing its form so as to alter the specification of it. This rule does not apply to demonstrative legacies, *i.e.* legacies of so much money with reference to a particular fund for payment, for although the particular fund be not in existence at the testator's death, the legatees will be entitled to satisfaction out of the general estate. If a debt be specifically bequeathed, and then received by the testator, the legacy is adeemed because the subject is extinguished and nothing remains to which the words of the will can apply (2 Williams, Ex., pt. iii. bk. iii. ch. iii. s. 1).

In the case of the devise of a mortgaged estate, the rule in English law is different from the Roman law as to *legatum* of a pledged immovable. For by Locke Kings' Act and the Acts amending it (17 & 18 Vict. c. 113; 30 & 31 Vict. c. 69; 40 & 41 Vict. c. 34), unless a contrary intention is signified, the mortgaged land, whether freehold or leasehold, is the primary fund for payment of the charge upon it, and the devisee is not entitled to have the debt discharged out of the personal or any other real estate of the testator. This rule does not apply to chattels personal (par. 5, above; *Lewis* v. *Lewis*, L. R. 13 Eq. 218).

In English law, when stock or a debt is specifically bequeathed, and the stock sold in part or the debt

received in part, the legacy is adeemed *pro tanto* (*Ashburner* v. *McGuire*, 2 Bro. C. C. 108; *Fryer* v. *Morris*, 9 Ves. 360).

13. By English law a creditor may release a debt by will. If a debtor be appointed executor, the rule formerly was that at law the debt was extinguished, but in equity the executor was accountable for his debt as assets, and it seems now settled that the debt is general assets for the payment of the testator's debts and legacies (2 Williams, Ex., pt. iii. bk. iii. ch. ii. s. 9). Since the Jud. Act the rule of equity prevails (Jud. Act, 1873, s. 25, (11)).

14. Where a debtor bequeaths to his creditor a legacy equal to or exceeding the amount of his debt, it is presumed, in the absence of a contrary intention, that the legacy was meant as a satisfaction of the debt. This rule has been often censured by the Courts, which have inclined to lay hold on minute circumstances to ground an exception to it. Contingency or uncertainty of the legacy, its not being payable at the testator's death, etc., take it out of the rule. A legacy of a specific chattel is not a satisfaction. As to the satisfaction of portions by legacies, the Courts incline against double portions, so that where a parent is under obligation by settlement to provide portions for his children, and he afterwards makes a provision by will for them, such provision is taken as full or part satisfaction of the obligation (2 Williams, Ex., pt. iii. bk. ii. ch. ii. s. 8). Where a creditor is appointed executor, this is no extinguishment of the debt unless the executor has assets of the debtor, which he may retain to pay himself (2 Williams, Ex., pt. iii. bk. iii. ch. xii. s. 1).

15. For *dos* see Tit. VIII. A mere gift of personal estate, or of an interest in lands not liable to dower, will

not defeat the widow's claim to dower (1 Jarman, ch. xiv.).

16. In English law an executor or administrator stands in the position of a gratuitous bailee, so that he is not to be charged without some default in him. Thus, if any goods of the testator are stolen from his custody, or are lost by casualty, as by accidental fire, the executor is not charged with these as assets (2 Williams, Ex., pt. iv. bk. ii. ch. ii. s. 2; *Clough* v. *Bond*, 8 Myl. & Cr. 496).

18. The rule is the same in English law (Wentworth, Office of Executor, 445, 4th edit.).

19. This is obviously the case in England now that a will speaks from the time of the testator's death (1 Vict. c. 26, s. 24).

20. *Dies cedit* signifies the vesting of an interest; *dies venit*, the interest becoming payable. So in English law a legacy, for instance, may vest at the testator's death, but not become payable until the legatee attains the age of twenty-one. An example is *Bolger* v. *Mackell*, 5 Ves. 509.

21. Incorporeal things, whether real or personal, *e.g.* tithes or copyright, may be devised or bequeathed in English law. The executor, like the *heres*, may sue for a debt in the name of the legatee to whom it has been bequeathed, and that without joining the legatee (Jud. Act, 1875, Ord. xvi. r. 7, note in edition by Wilson).

22. So in English law the legatee and not the executor has the right of choice in such a case (*Jacques* v. *Chambers*, 2 Coll. 435).

23. There does not seem to be any authority as to the corresponding English law. Probably the question would depend upon whether the election was in terms a personal privilege of the legatee or not.

24. No rule like this exists in English law, for devises

or legacies are good if made to persons whom the Roman rule would exclude, *e.g.* children of persons convicted of treason, heretics, or children of prohibited marriages (Sandars on Tit. XIV. *Pr.*).

25. It is probable (though there does not seem to be any decision directly in point) that such gifts as those mentioned in this paragraph would be good by English law, on the principle *id certum est quod certum reddi potest.* A devise to "one of my cousin's daughters that shall marry with a Norton within fifteen years," has been held to mean the daughter who shall first marry a Norton, and to be a good devise (*Bate* v. *Amherst*, T. Raym. 82).

26. A gift to a posthumous stranger is good, provided that it does not trench upon the rule against perpetuities, which, in the case of contingent remainders, is that an estate cannot be given to an unborn person for life, followed by an estate to a child of such unborn person, for then the last estate is void (Williams, R. P., pt. ii. ch. ii.); in the case of an executory interest is that the executory estate must commence within the period of any fixed number of now existing lives and an additional term of twenty-one years, with a further period for gestation (if existing); if it transgress these limits it is void altogether, not simply the transgressing part, as in contingent remainder (*ibid.* ch. iii.). The rule is the same as to executory interests in personalty, in which there can exist no contingent remainder (Williams, P. P., pt. iv. ch. i.).

28. A bequest to the Rev. *Charles* Smith was held to apply to a person who answered the other parts of the description, but whose name was *Richard* (*Smith* v. *Coney*, 6 Ves. 42). This is an example amid numerous other cases of the same nature. The principal difficulty arising with respect to such cases in English law is as

to the admissibility of parol evidence to control the will, a point upon which the decisions are not easily reconcilable. In a case of *Still* v. *Hoste* (6 Mad. 192), a bequest was made to *Sophia*, daughter of Peter Still. Peter Still had two daughters, *Selina* and *Mary Ann*, and parol evidence was admitted to show that Selina was the person meant. In this case, if there had been only one daughter, no extrinsic evidence need have been given to support her claim. See 1 Jarman, ch. xiii., for a review of the cases.

30. The English maxim upon this subject is *falsa demonstratio non nocet cum de corpore constat*, the nearest approach to which in Roman law is Dig. xxxiii. 4, 1, 8. See 1 Jarman, ch. xxiv. Thus, a devise of "my freehold houses in Aldersgate Street, London," was held to pass leasehold houses, those being the only ones owned by the testator there (*Day* v. *Trig*, 1 P. Wms. 286).

31. "It does not appear that a bequest actually made, or a power given, can be controlled merely by the reason assigned. The assigned reason may aid the construction of doubtful words, but cannot warrant the rejection of words that are clear" (1 Jarman, ch. xv.).

35. Compare in English law a devise of an estate tail, a legacy to A, and after his death to B, etc., which are perfectly valid, provided that the rule of perpetuities be observed. But a gift to take effect on the day previous to the death of A would probably be void for uncertainty.

36. The law is the same in England. Thus, a condition to marry or not to marry A is valid, whether there be a gift over or not. In the instances in this paragraph there is a gift over. In English law the question as to whether or not there is a gift over is important in many cases; *e.g.* where there is a condition that a gift shall be forfeited if the donee marry without

consent, if the gift be of realty, it will cease in the event of marriage without the required consent; if of personalty, the condition is merely *in terrorem* and void unless there be a gift over (2 Jarman, ch. xxvii.). For the Roman law, see Hunter, 765.

The law as to impossible conditions in wills has been noticed at Tit. XIV. 10. Illegal conditions follow the same rule. As to conditions *contra bonos mores*, the Roman law probably included more under that term than does the English, for everything recognized by the English Courts as immoral is an offence against ecclesiastical law (Pollock, ch. vi.), and so to some extent illegal. It will be noticed that only conditions are spoken of; practically all questions relating to impossibility, illegality, or immorality resolve themselves into questions of conditions, for the question of consideration does not enter into wills.

## Tit. XXI.

The English law is the same. If a testator devise lands to a person in fee and then by a subsequent will or codicil devise the same land to another in fee, the latter devise operates as a complete revocation of the former. So if the residue of personal estate be given by will to A and by codicil to B, the former gift is revoked. Greater anxiety is evinced by the Courts to reconcile apparent inconsistencies if they are in the same testamentary paper than if they are in distinct paper of different dates. Thus, a devise in fee to A and in the same paper a devise in fee to B would make A and B take concurrently, but if the gifts were in two separate wills, the first would be revoked by the second

(1 Jarman, ch. vii.). Revocation may also take place by the republication of a prior will (1 Williams, Ex., pt. i. bk. ii. ch. iii. s. 5). If the testator expressly grounds his revocation on a fact which turns out to be false, the revocation does not take effect (1 Jarman, *ubi supra*). But English law does not go as far as Roman law in holding (see Sandars, *ad loc.*) that a legacy could be impliedly revoked by a notorious and deadly enmity springing up between the testator and the legatee. See Bk. I. Tit. XXV. 11.

## Tit. XXIII.

*Fideicommissum* represents the English trust in a very limited degree. Some of the principal differences are these :—

(1) *Fideicommissum* could only be created by will, letter, or *codicillus* (unless in the case of a person about to die intestate, par. 10), and included only such trusts as carried out the last wishes of a deceased person. A trust may be express, implied, or constructive. Express may be created by writing or by will (Snell, pt. ii. ch. i.) ; implied and constructive trusts (which had no counterpart in Roman law, as far at least as falls under the head of *fideicommissa*) and express trusts of chattels personal may be established by parol. See, for instance, the case of *Re Fleetwood*, 15 Ch. D. 594.

(2) *Fideicommissum* could only be enforced through the *heres;* if there were no *heres*, there could be no *fiduciarius*.

(3) *Fideicommissa* seem to have been introduced for purposes different from those for which trusts were instituted. In Mr. Spence's opinion, *fideicommissa* were

introduced either in order to enable lands to be entailed, or in order that persons might take by *fideicommissa* who could not take by direct appointment; while trusts or uses (see 1 Stephen, bk. ii. pt. i. ch. ix, note (d)) were created in order to obtain a person of influence as feoffee to uses, to defraud creditors or avoid attainder, and to dispose of estates by devise (1 Spence, 21, 435, 440). Sir G. Bowyer (Introduction to Civil Law, 46) regards the division of English estates into legal and equitable as suggested rather by *ususfructus* than *fideicommissum*.

1. Trusts seem to have had much the same history. The reign of Henry V. is to the law of trusts what the reign of Augustus is to the law of *fideicommissa*. It was not until the reign of Henry V. that applications were made against feoffees to uses for breach of trust (1 Spence, 443). With the recognition of *fideicommissa* by *leges* and imperial constitutions compare the recognition of uses by the Statute of Uses (27 Hen. VIII. c. 10). Trusts have been dealt with by many modern statutes, *e.g.* the Trustee Act, 1850.

Trusts, having originally no legal sanction, depended at first for their validity upon the religious sanction afforded by an oath, of the breach of which a Court of Conscience took cognizance. Compare in Roman law the old practice of making the *heres* take an oath to perform the testator's wishes (Cicero, Verres, ii. 1, 47).

4. For *actiones utiles*, see Bk. IV. Tit. III. 16.

5. Roman law allowed the *fiduciarius* his fourth of the inheritance as a recompense for his trouble; English law in the case of a trustee does exactly the reverse, for it is an elementary maxim that the trustee shall not derive any personal advantage from the administration of the trust property (Lewin, ch. xiii.), unless there is some special provision to that effect in the instrument creating the trust or in the rare case of the failure of

heirs of the *cestui que trust*, as in *Burgess* v. *Wheate*, 1 Eden, 177. In the case of intestacy of a *cestui que trust* of chattels without next of kin, the beneficial interest does not remain with the trustee, but goes to the Crown (Lewin, *ubi supra*).

10. Such a request does not seem legally possible in English law. A man dies either testate or intestate, and if the latter, the property goes either to the heir-at-law or next of kin, and it would be scarcely possible to affect such persons with a parol trust. The cases in the books where the property of a deceased person is affected with a trust seem to be all cases of devise or bequest (Lewin, ch. v. s. 3; 1 Jarman, ch. ix., xiii.; *Re Fleetwood*, 15 Ch. D. 594).

11. So in English law, if a feoffment had been made to A and his heirs to the use of B and his heirs to the use of C and his heirs, B became entitled at law under the Statute of Uses to an estate in fee simple, and stood to A in the position of *cestui qui use*, but in equity he was simply a trustee for C, the ultimate *cestui que trust* (Williams, R. P., pt. i. ch. viii.).

12. With the proceedings in this paragrah compare the "reference to the oath of the party" still existing in French (*serment décisoire*) and Scotch law. It is recognized in Scotch law by 16 & 17 Vict. c. 20, s. 5; and a case in the House of Lords, where it was refused from the nature of the circumstances, occurred as lately as 1867 (*Longworth* v. *Yelverton*, L. R. 1 H. L. Sc. 218). The wager of law, which existed in England until abolished by 3 & 4 Will. IV. c. 42, s. 13, may have been a modification of the Roman decisory oath (1 Spence, 228). The defendant was only permitted to wage his law in certain actions, as debt or detinue. The process was to swear that the debt was not due, confirming his credibility by the oaths of co-jurors, double the number

of the witnesses produced by the plaintiff up to the number of twelve. The oath was conclusive. The sanction of perjury in such a case was originally religious rather than legal. In one case the Court of Chancery relieved a plaintiff from the consequences of the defendant having waged his law, the latter admitting by his answer that he had received and not repaid certain money (1 Spence, 696; 3 Reeves, ch. xxx.).

## Tit. XXIV.

3. "In creating a trust, a person need only make his meaning clear as to the interests he intends to give, without regarding the technical terms of the common law in the limitation of legal estates." "But though technical terms be not absolutely necessary, yet where technical terms are employed they shall be taken in their legal and technical sense" (Lewin, ch. viii. s. 1).

Numerous questions have arisen as to the force of precatory words in wills and settlements *inter vivos* in constituting the person *primâ facie* entitled to the benefit a trustee. The cases turn chiefly upon the language used in the particular instances, and will be found in Lewin (ch. viii. s. 2). "The current of decisions has of late years set against the doctrine of converting the devisee or legatee into a trustee" (*ibid.*).

## Tit. XXV.

A codicil was originally in English law "an unsolemn last will," and more especially a document which would

have been a valid will but for its omission to nominate an executor. It also meant any addition to or alteration in a will made by a separate writing. In the modern use of the word it is a part of the will, making with it but one testament (1 Williams, Ex., pt. i. ch. ii.). The law as to the execution, etc., of codicils is now the same as that relating to wills, for by the interpretation clause of the Wills Act (1 Vict. c. 26) the word "will" includes codicil. A codicil may be written on the same paper as the will or on a separate paper (1 Jarman, ch. vi. s. 4). The will and any codicil or number of codicils form but one testament, and are to be read together, so that a duly attested codicil sets up an unattested will by referring to it; but a disposition by unattested codicil cannot be authorized by the will (*ibid.*). The number of codicils which a testator may make is, as in Roman law, unlimited. The chief differences between the English and Roman codicil may be shortly summed up as follows:—(1) Roman less formal than will; English need the same forms. (2) Roman have less authority than will, for the *hereditas* could not be dealt with; English are of equal authority with will. (3) Only *fideicommissa*, not *legata*, could be created by Roman (unless where codicil was confirmed by will); legacies or devises can be made by English. (4) Roman could be made without a will; English are only supplementary to a will, but in some cases where a will has existed and been destroyed, the codicil has been held to be valid (1 Jarman, ch. vii.).

# BOOK III.

## Tit. I.

*Pr.* This agrees with English law, except as to the necessity for a *heres.*

1. The Roman law as to intestate succession, as it existed in the time of the Institutes, was entirely different from the English: (1) it made no distinction between real and personal property; (2) the persons entitled to succeed were different; (3) it recognized no local customs differing from the general law, as English law does in the case of gavelkind and borough-English, and in the case of customary descents in certain manors, of which an example will be found in *Muggleton* v. *Barnett*, 2 H. & N. 653; (4) it admitted no rights of the State where a husband died and left a wife surviving, but no blood relations; (5) the Roman law was partly statutory (based upon the XII. Tables), partly prætorian; the English law as to realty is partly common-law and partly statutory, as to personalty is entirely statutory.

The English law of succession to realty depends chiefly upon 3 & 4 Will. IV. c. 106, amended by 22 & 23 Vict. c. 35. But some of the rules, *e.g.* that the male issue are admitted before the female, are simply affirmations of the common law. The law of succession to personalty is regulated by the Statutes of Distribution

(22 & 23 Car. II. c. 10, 1 Jac. II. c. 17), and is based upon the Roman rule as enacted by Justinian after the date of the Institutes in Nov. 118 and 127 (see note on Tit. IX.). The rules as to real property will be found in 1 Stephen, bk. ii. pt. i. ch. xi.; Williams, R. P., pt. i. ch. iv.; as to personalty, in 2 Stephen, bk. ii. pt. ii. ch. vii.; Williams, P. P., pt. iv. ch. iv. A very useful table of rights of succession to both real and personal property in a great number of particular instances will be found in Hudson's Guide to Making and Proving Wills, p. 139.

5. By English law a man cannot be found guilty of crime after his death, though it was otherwise as late as the seventeenth century in Scotland and France (Mackenzie, pt. vi. ch. iii. See note to Bk. IV. Tit. XVIII.).

In old English law a consequence of attainder for treason or felony was corruption of blood, so that an attainted person could neither inherit lands nor transmit them by descent. The only exception seems to have been where a man had been attainted and afterwards pardoned, and a son was born after the pardon; in such a case the son might inherit (Co. Litt., 392 a). See on the subject of attainder and corruption of blood 1 Stephen, bk. ii. pt. i. ch. xii.; 4 Stephen, bk. vi. ch. xxiii.; and Bk. IV. Tit. XVIII. The matter is now only of antiquarian interest, for the Felony Act, 1870 (33 & 34 Vict. c. 23, s. 1), provides that no judgment for any treason or felony shall cause any corruption of blood.

6. The terms *per stirpes* and *per capita* are used in English law. The common law knows no other rule of succession than that *per stirpes* (3 Stephen, bk. ii. pt. ii. ch. vii.). Beyond brothers' and sisters' children, no right of representation belongs to the children of relatives with respect to the shares which their deceased parents would have taken. If the intestate have neither

brother, sister, nor mother living, the distribution is *per capito* (Williams, P. P., pt. iv. ch. iv.). The distinction between *per stirpes* and *per capita* exists only in respect of personalty; the rule in realty is *per stirpes* only (1 Stephen, bk. ii. pt. i. ch. xi.).

9. Emancipated children, when granted *bonorum possessio*, were obliged to bring into the inheritance (*collatio bonorum*) all the property they possessed at the father's death, for if they had remained in the family it would have been acquired for the father and have been part of the inheritance (Sandars, *ad loc.*). The English law as to hotchpot is said by Blackstone to be derived from the *collatio bonorum* (2 Stephen, bk. ii. pt. ii. ch. vii.). The term hotchpot is used to signify the bringing into the general stock and adding thereto any advancement or other benefit which the recipient may have had previously to the division of the property to a share which the recipient is entitled. The rule of hotchpot is applied in three instances: (1) where one of two or more sisters to whom lands have descended in coparcenary holds an estate which has been given to her in frankmarriage (1 Stephen, bk. ii. pt. i. ch. viii.); (2) in successions to personalty under the Statute of Distribution (2 Stephen, *ubi supra*); (3) in marriage settlements (Williams, P. P., pt. iv. ch. i.). In (1) and (2) the bringing into hotchpot is by act of the law, in (3) by act of the party, and therefore not invariably though generally used.

## Tit. VI.

These degrees of cognation are adopted by English law. See the table in 2 Stephen, bk. ii. pt. ii. ch. vii.

## Tit. IX.

*Pr.* The prætor could not give the *dominium quiritarium*, but only the *dominium bonitarium* (Sandars, *ad loc.*; Poste on Gaius, ii. 61). But in the time of Justinian the distinction between the two kinds of *dominium* had become merely a matter of historical interest. The distinction between legal and equitable estate and legal and equitable assets (see Snell, ch. xiv.), whether founded or not upon the Roman distinction in *dominia*, is still of importance in English law. But in the case of succession, it cannot be said that English law has anything corresponding to *bonorum possessio*. Nothing like *possessio contra tabulas* can be given, for where a will is overthrown by proof of the incapacity, etc., of the testator, there is an intestacy in English law. *Possessio secundum tabulas* corresponds in some degree to administration *cum testamento annexo* (see note on Bk. II. Tit. XIV.). Some of the persons called by the prætor to the succession could, of course, have no possible right, or even existence in England (cited from Bracton, at p. 83).

The prætor did not admit any one whom the law openly rejected (Sandars, *ad loc.*); compare with this the English rule, that equity follows the law as to the descent of estates and the law of limitation (Snell, pt. i. ch. ii.).

2. Compare the English maxim cited from Bracton at p. 83.

10. It may be useful here to notice some of the differences between the Roman law of succession of the *cognati* to the estate of an intestate, as altered by Nov. 118 and 127, and English law on the same subject. See note on Tit. I., as to which notice that (1) still existed

under the new legislation, so that there was no primogeniture or preference of males in the case of realty; (2) and (3) remained as before; as to (4), the law became regulated by constitution instead of being partly prætorian. As to (2), notice that (a) at Rome a widow had no right to any share in the property of her deceased husband: in England she has her dower (if not barred) in the case of realty, her half if there be no child or children, her third if there be child or children, in the case of personalty; (b) the husband of a married woman did not succeed, as he did by the common law of England, to all personalty not settled to her separate use or left by will sanctioned by her husband and allowed by him to be proved; (c) where there were no descendants, the ascendants shared the inheritance with brothers and sisters of the whole blood: in England the brothers or sisters do not share with the ascendants in the case of realty, in the case of personalty the father takes altogether, the mother share with the brothers and sisters; (d) the half-blood succeeded next after the whole blood in Rome: this is the case in England as to realty, but not as to personalty, in which the whole and half blood have equal rights; (e) grandchildren took *per stirpes* in all cases in Rome: in England they take *per stirpes* if any of the previous generation survive, *per capita* if not; but where there are grandchildren and great-grandchildren the division is *per stirpes* (*Re Ross' Trusts*, L. R. 13 Eq. 286). Of course to real estate the heir succeeds. See Williams, P. P., pt. iv. ch. iv.; Mackenzie, pt. iv. ch. vii.

## Tit. XI.

The law of this and of the previous title has no counterpart in England.

5. The term *restitutio in integrum* is frequently found in English decisions, *e.g. Phosphate Sewage Co.* v. *Hartmont*, 5 Ch. D. 394. In the Institutes it seems to be used only of persons under the age of twenty-five, whom the prætor relieved from inconsiderate contract by *restitutio in integrum*. See Sandars on Bk. I. Tit. XXIII. 2; Bk. II. Tit. XIX. 5. In England it applies to any contract, whether by infants or not, where the parties are restored by the Court to the position which they occupied before the contract. The most important cases have arisen upon the rights of shareholders in a joint stock company to have their contracts rescinded, on the ground of fraud in the company or its agents after the company has been ordered to be wound up. A very important recent case on this point is *Houldsworth* v. *City of Glasgow Bank*, 5 App. Cas. 317.

## Tit. XII.

*Pr.* When a Roman debtor was unable to pay his debts, proceedings might be taken against him by *venditio bonorum* (or later by *distractio bonorum*), which was accompanied by *infamia*, and under which the creditors became not owners but mortgagees of the debtor's property, having the whole use and enjoyment of it, or *cessio bonorum*, not accompanied by *infamia*, by which the estate was surrendered to the creditors. The *venditio* corresponds roughly to the English execution, which can only take place after judgment; in the case

of a trader, an execution for a sum of not less than £50 in an act of bankruptcy (32 & 33 Vict. c. 71, s. 6 (5)). The *cessio* was made by surrender either in the presence of the prætor or not; no formalities were necessary, it was sufficient if the debtor signified in any way a wish to surrender the estate. In English law a conveyance or assignment of all the debtor's property to a trustee or trustees for the benefit of his creditors generally is an act of bankruptcy (32 & 33 Vict. c. 71, s. 6, (1)), but the debtor may cede his property by composition. Proceedings against a debtor for the benefit of creditors must, in England, be under the sanction of the Court in all cases, and may be of one of three kinds—bankruptcy, liquidation, or composition. In bankruptcy the proceedings are initiated by a creditor, in liquidation and composition by the debtor himself, so that the former is involuntary as far as regards the debtor, the two latter voluntary. In both the latter cases the resolution of the creditors must be registered, so that the Court by this means obtains a certain control over the proceedings, though not so fully as in bankruptcy. The chief differences between liquidation and composition are, that in the former the property in the debtor's estate passes to the trustee, in the latter it still remains in the debtor; in the former, as in bankruptcy, all creditors are bound (*Elmslie* v. *Corrie*, 4 Q. B. D. 295), in the latter only those as to whom the conditions necessary by 32 & 33 Vict. c. 71, s. 126, par. 7, have been fulfilled (*Breslauer* v. *Brown*, 3 App. Cas. 672). In cases of liquidation and composition, the Court may, if it think fit, adjudge the debtor a bankrupt (32 & 33 Vict. c. 71, ss. 125, 126).

Nothing corresponding to *infamia* attaches to ordinary bankruptcy in England; if, however, the bankruptcy be fraudulent in any way, that is to say, if the debtor have committed any of certain specified acts mentioned in the

Debtors' Act, 1869 (32 & 33 Vict. c. 62), he is guilty of felony or misdemeanor, according to circumstances.

The vesting of the estate of a bankrupt in his trustee has been said to be the nearest approach in English law to the acquisition or descent of a *universitas*. The *universitas* does not completely pass, for the trustee does not come into possession of the tools of trade, wearing apparel, etc., of the bankrupt to the value of £20 (32 & 33 Vict. c. 71, s. 15 (2)), his ecclesiastical patronage (s. 15 (4)), or the proceeds of his personal labours, or damages recovered by him in an action of tort (*Ex parte Vine*, 8 Ch. D. 364). See notes on Bk. IV. Tit. VI. 6, 40.

Roman law did not make the distinction between traders and non-traders which is still of importance in English law, and was of still greater importance up to 32 & 33 Vict. c. 83.

## Tit. XIII.

*Pr.* It is perhaps in the law of contract, especially in that part of it relating to bailments, that Roman law has exercised the most influence over English law. See, for instance, Jones or Story on Bailments, *passim*.

The word "obligation" is used in different senses in English law, though it is easy to see that the senses have had a common origin.

(1) It denotes (a) any duty imposed by law, (b) that special right which creates a *vinculum juris* between two persons or groups of persons. The second is the only sense in which the word ought to be employed (Anson, pt. i. Introd. s. 2); but as used by English judges, the word is certainly wide enough to include the first sense.

See *Winch* v. *Conservators of the Thames*, L. R. 9 C. P. 378; *Julius* v. *Bishop of Oxford*, 5 App. Cas. 214.

(2) It is used, especially by the older writers, to denote not the duty but the evidence of the duty, that is to say, an instrument under seal, otherwise called a bond, whereby the party from whom the security is intended to be taken obliges himself to pay a certain sum of money to another at a day specified. The party bound is called the obligor, the party in whose favour the bond is made the obligee. The bond is either single, *simplex obligatio*, or double, called also conditional (Vin. Abr. Obligation; 2 Stephen, bk. ii. pt. ii. ch. v.; 5 Davidson, pt. ii. Bonds). A sentence from Maine's Ancient Law will show the identity of the words "bond" and "obligation;" they are identical in the language both of jurisprudence and of English law. "The obligation is the 'bond' or 'chain' with which the law joins together persons or groups of persons, in consequence of certain voluntary acts" (Maine, ch. ix.).

It may be noticed that Bracton (99 a) uses the word evidently in its Roman sense, a sense narrower than that which it bears in English law, for *obligatio* certainly did not mean a deed, and probably did not mean a legal duty of so general a kind as (a) above.

With the Roman classification of *obligationes* under *res* may be compared the interpretation clause of the Bankruptcy Act, 1869 (31 & 32 Vict. c. 71, s. 4), where obligations are included under "property." The trustee succeeds to the onerous as well as the lucrative property of the bankrupt.

1. One might perhaps compare with *prætoriæ obligationes* the equitable *vinculum juris* arising between *cestui que trust* and trustee or wife and husband, unknown to the common law.

2. Obligations in English law may arise in the same

way (subject to what will appear hereafter as to the meaning of quasi-contract and quasi-delict).

Bracton (99 a) follows the Roman law, with additions of his own in dividing, as he does, *obligationes ex contractu* into those arising *re, verbis, scripto, consensu, traditione, junctura.* Possibly the substitution of *scripto* for the *litteris* of the text is caused by his wish to emphasize the importance of the deed as a form of contract.

To the Roman classes of obligation may be added in English law the obligations arising from judgment and the obligations such as those arising between trustee and *cestui que trust*, husband and wife, executor and legatee (Anson, pt. i., Introd. s. 2).

The usually accepted English division of contracts is into: (1) contracts by matter of record; (2) contracts under seal, called specialties or covenants; (3) contracts not under seal or by deed, called simple or parol contracts. The last two classes are also called contracts *in pais*, to distinguish them from contracts of record; in reality it seems wrong to call contracts of record contracts at all, as the obligation does not spring from agreement, but is imposed on the parties *ab extra* (Anson, pt. i., Introd. s. 2; pt. ii. ch. ii. s. 1).

There is no definition of *contractus* in the Institutes. English definitions will be found in any of the English text-books upon the subject. By the Indian Contract Act, 1872, s. 2, "an agreement enforceable by law is a contract."

It will be convenient to summarize here some of the principal differences between the English and Roman contract, leaving others for notice in the following pages, as they are suggested by the text.

(1) The doctrine of consideration is foreign to Roman law. It is probable that originally one of two conditions was necessary for the validity of a contract, solemn form,

or the acceptance of benefits of a certain kind from which the law will imply a promise to repay them. The formal contract of Roman law was the *stipulatio*, of English the contract under seal. But there were contracts in Roman law which were legally enforceable if a *causa* were present, that is to say (putting *litterarum obligatio* aside as obsolete in the time of Justinian), the real and consensual contracts. So in English law there are contracts not under seal which are enforceable if a consideration be present. In English law the doctrine of consideration as a necessary ingredient in every contract has so far overpowered the doctrine that a contract under seal is valid from its form only, that the modern law is that a deed imports consideration. "If the Roman lawyers or the civilians in modern times had ever fairly asked themselves what were the common elements in the various sets of facts which under the name of *causa* made various kinds of contracts actionable, they could scarcely have failed to extract something equivalent to our consideration" (Pollock, ch. iv.; see Anson, pt. ii. ch. ii.). The *causa* was delivery in the case of real, simple consent according to the Roman view, but really valuable consideration, in the case of consensual contracts. In England, "a valuable consideration, in the sense of the law, may consist either in some right, interest, profit, or benefit accruing to the one party, or some forbearance, detriment, loss, or responsibility, given, suffered, or undertaken by the other" (*Currie* v. *Misa*, L. R. 10 Exch. 162). This fundamental difference will account for several matters in which the Roman and English laws of contract disagree. Thus, (a) the *contrats de bienfaisance* of French law (see Cod. Civ. 1105) are quite consistent with a system in which *pietas* (Dig. xii. 6, 32, 2) or free gift (Hunter, 138) was a *causa*, but could scarcely

exist under the name of contracts in England; (b) the meaning of *nudum pactum* (a term often used in English decisions, *e.g. Pillans* v. *Van Mierop*, 3 Burr. 1664; *Rann* v. *Hughes*, 8 T. R. 350) is different. In Roman law it means an agreement without *causa;* in English law an agreement without consideration. In both systems it is apparently used only for agreements which do not depend upon their form for their validity (*Qu.* whether an English deed could under any circumstances be called a *nudum pactum*). (c) In English law a proposal may be revoked at any time before acceptance, unless there is a distinct collateral contract, founded on an independent consideration, to keep it open for a certain time (*Dickinson* v. *Dodds*, 2 Ch. D. 463). But this and the earlier case of *Cooke* v. *Oxley*, 3 T. R. 653, would have been differently decided in Roman law (Benjamin, bk. i. pt. i. ch. iii.). It is possible that the civilians and ecclesiastical chancellors worked out independently the Roman theory of obligation, so that it finally converged with the common law theory of *quid pro quo* (Pollock [3rd edit.], Introd.). See further upon consideration, 1 Spence, 186; 2 Stephen, bk. ii. pt. ii. ch. v.; Anson, pt. ii. ch. ii. s. 4; Holmes, lect. vi.

(2) A distinction is drawn in English law between contracts as to real and personal property which did not exist in Roman law. In Roman law a contract for the sale of real property was good without writing, if made by *stipulatio;* in England the provisions of the Statute of Frauds require that any contract or sale of lands or any interest in or concerning them shall be in writing. See note on Tit. XXIII.

(3) Roman contracts were never assignable; thus negotiable instruments, such as bills of lading or bills of exchange, were unknown to Roman law (Poste on Gaius, iii. 155).

(4) The persons incapable of contracting were different in the two systems. Reasons of public policy here intervene. Thus, the Roman incapacity of a person between twenty-one and twenty-five years of age and of a slave is unknown to English law; the incapacities attaching by the Property Tax Act (5 & 6 Vict. c. 35, s. 103), the Factory Acts, the Truck Act, the Ground Game Act, 1880, etc., and the incapacity up to very recent times of married women, were, of course, unknown to Roman law.

(5) The circumstances avoiding contracts were different. Informality in the *stipulatio* is an example of such a circumstance in Roman law; non-compliance with the Statute of Frauds or the Public Health Act (as in *Hunt* v. *Wimbledon Local Board*, 4 C. P. D. 48) is an English example.

(6) The methods by which contracts were discharged were different. Thus, *acceptilatio* is peculiar to Roman law; release under seal to English law.

(7) The *naturalis obligatio* seems peculiar to Roman law. It was an agreement that could not be enforced by action, but was not in other respects destitute of legal effect, as it could be used as a basis for other agreements enforceable by action or as a defence. An instance is a debt from a master to a slave (Dig. xii. 6, 64). In English law the principle of *naturalis obligatio* or the validity as an agreement of an agreement of imperfect obligation is not recognized (see note to Bk. IV., Tit. XIII. *Pr.*).

(8) Certain contracts, as marriage brocage contracts, illegal in England (*Hall* v. *Thynne*, Shower P. C. 76), were legal in Roman law (Dig. l. 14, 3). So a contract to try a non-ecclesiastical question in the bishop's court would scarcely be good in England, but would undoubtedly have been so in Roman law (Cod. i. 4, 7).

## Tit. XIV.

*Pr.* The word *mutuum* has not been adopted in English law, but the Roman *mutuum* becomes the English deposit, loan, or sale, according to circumstances. "Wherever there is a delivery of property on a contract for an equivalent in money or some other valuable commodity, and not for the return of the identical subject matter in its original or an altered form, this is a transfer of property for value—it is a sale and not a bailment" (*South Australian Insurance Co.* v. *Randell*, L. R. 3 P. C. 108). In the case of an ordinary deposit with a banker, the transaction is a *mutuum;* but where special bills or securities are deposited, it becomes a *depositum.*

The *condictio* corresponds, to some extent, with the action for money lent, or for money paid, of English law. The action brought to recover money paid on a failure of consideration was perhaps a direct imitation of the *condictio* (Pollock, ch. iii.); but an action brought on the "money counts" of old pleadings was less extensive than the *condictio.* That was either *certi* or *incerti*, while the action for money lent, etc., could only be brought for liquidated damages (Bullen, 41). The *condictio certi* was older in time than the *condictio incerti*, just as in English law the action for liquidated damages existed before the action for unliquidated damages (Pollock [3rd edit.], Introd.).

The false etymology of *mutuum* in the text find its parallel in those false etymologies which are not unknown to English text-writers. Instances are *villa* and *vicus* (Co. Litt., 115 b); *servi* (116 b); gavelkind (140 a); felony (381 a); feud (1 Stephen, bk. ii. pt. i. ch. ii.).

1. The *actio condictitia* may be compared with the action for money received in English law. The old count for money received before the Judicature Acts was the most comprehensive of all the common counts. It was applicable whenever the defendant had received money which in justice and equity belonged to the plaintiff, under circumstances which rendered the receipt of it a receipt by the defendant to the use of the plaintiff (Bullen, 44).

Money paid under a mistake of fact is recoverable both in Roman and English law (Mackenzie, pt. iii. ch. vi. s. 2; Pollock, ch. viii.). As to money paid under a mistake of law, there is a difference of opinion as to whether it could be recovered by Roman law. The opinion of Savigny is that it could not, except where it could be proved that such ignorance was excusable, and not the result of gross negligence (System, vol. iii. App. 8, s. 35; Mackenzie, *ubi supra*). In English law, money paid under a mistake of law cannot be recovered. *Ignorantia juris neminem excusat*, following the rule of Roman law, *regula est juris quidem ignorantiam cuique nocere, facti vero ignorantiam non nocere* (Dig. xxii. 6 *pr.*). Thus, in *Bilbie* v. *Lumley*, 2 East, 469, it was held that an underwriter could not recover money paid upon the loss of a ship, which he had paid in ignorance that he had a defence owing to concealment of a material fact by the assured. Where the word *jus* in the maxim above quoted is used in the sense of a private right, the maxim has no application (*Cooper* v. *Phibbs*, L. R. 2 H. L. 149). Roman law recognizes certain exceptions to the rule that every citizen was supposed to know the law. Women, minors, and soldiers were permitted to plead ignorance (Poste on Gaius, iii. 220). Such an exemption is unknown in English law; it is even no defence for a foreigner, charged with a crime committed

in England, to allege that the act with which he is charged is not criminal in his own country (*R.* v. *Esop*, 7 C. & P. 456).

2. *Commodatum* has been adopted as one of the divisions of bailments in English law since the decision of Lord Holt in *Coggs* v. *Bernard*, 1 Smith, L. C., citing Bracton, whose *commodatum* agrees with the Roman (2 Twiss' Bracton, Introd. xxvii.). The division is into the six classes—*depositum*, or a naked bailment of goods to be kept for the use of the bailor; *commodatum*, where goods or chattels that are useful are lent to the bailee gratis, to be used by him; *locatio rei*, where goods are lent to the bailee, to be used by him for hire; *vadium*, pawn; *locatio operis faciendi*, where goods are delivered to be carried, or something is to be done about them, for a reward to be paid to the bailee; *mandatum*, a delivery of goods to somebody who is to carry them, or do something about them, gratis. Other divisions that may be noticed are Sir W. Jones' in his Treatise on Bailments, and Mr. Justice Story's in his Law of Bailments. The division of the latter is into: (1) those in which the trust is exclusively for the benefit of the bailor, or of a third person, including deposits and mandates; (2) those in which the trust is exclusively for the benefit of the bailee, including gratuitous loans for use (*commodata*); (3) those in which the trust is for the benefit of both parties, or of both or one of them and a third party, including pledges or pawns, hiring, and letting to hire (s. 3).

As to the degrees of diligence required in the bailee, the Roman and English law agree. In (1) only slight diligence is required, and he is liable only for gross neglect; in (2) great diligence is required, and he is liable for slight neglect; in (3) the law requires ordinary diligence, and he is liable for ordinary neglect (s. 23).

For the meaning of diligence, see s. 11, *et seq.* In the case of executors and trustees, they are bound by English law to take as much care of the trust property as of their own (*Jones* v. *Lewis*, 2 Ves. 240), although the trust cannot be said to be for their benefit. Others, as Mr. Poste (Gaius, iii. 220), allow only two degrees of diligence in Roman law, ordinary and extraordinary, corresponding with the two degrees of *culpa*, for which see note to Tit. XXV. 9.

The view of Story as to the responsibility of the bailee is not quite the same as that taken by Roman law. "If a spirited horse is lent to a raw or rash youth, or to a weak and inefficient person, who is known to be such, the lender must content himself with such diligence as they may fairly be expected to use; and he has no right to insist upon the diligence or prudence of a very thoughtful and experienced rider" (s. 237). The rule as to exemption from responsibility for loss by *vis major*, etc., is the same in English law (s. 238).

In one or two other points Roman and English law differ. (1) By Roman law the borrower is not bound to return the thing till he has had the proper use of it, or until the bailment has terminated, although the lender previously demand it (s. 257). In English law all such loans are deemed precarious, and during the mere will and pleasure of the lender (s. 277). (2) The death of one of the parties does not necessarily revoke the loan, but such would probably be the case in English law (s. 278). (3) Marriage of a female bailor or bailee (before the Married Women's Property Act, 1882) revoked the loan in English but not in Roman law (*ibid.*). Since that Act the two systems probably agree. (4) The rule as to theft seems to be different. Loss by private theft, as distinguished from robbery, seems by Roman law to be presumptive evidence of ordinary neglect

(s. 38, Dig. xvii. 2, 52, 3); but in English law, theft *per se* establishes neither responsibility nor irresponsibility. If the theft is occasioned by any negligence, the bailee is responsible; if not, he is discharged (s. 338).

*Vis major* is a term adopted by English law, *e.g.* in the judgment of Cockburn, C.J., in *Nugent* v. *Smith* (1 C. P. D. 423). It is a term somewhat more extensive than "act of God;" for there may be *vis major* which is not an act of God (*ibid.*). Mellish, L.J., however, in his judgment in *Nicholls* v. *Marsland*, 2 Ex. D. 1, undoubtedly uses them as convertible terms. The term "act of God" is one difficult if not impossible to define. "It is a mere short way of expressing this proposition. A common carrier is not liable for any accident as to which he can show that it is due to natural causes, directly and exclusively, without human intervention, and that it could not have been prevented by any amount of foresight and pains and care reasonably to be expected from him" (Mellish, L.J., in *Nugent* v. *Smith*). The modern tendency seems to be to regard all questions upon this subject as reducible to questions of construction of the contract. "Where it is an answer to a complaint of an alleged breach of contract that the thing done or left undone was so by the act of God, what is meant is, that it was not within the contract" (*Bailey* v. *De Crespigny*, L. R. 4 Q. B. 185).

3. Deposit is defined by Story as "a bailment of goods to be kept by the bailee without reward, and delivered according to the object or purpose of the original trust" (s. 41). According to the principles stated above, in the note to par. 2, the depositary is therefore liable only for gross neglect. But he will not be relieved from liability simply on the ground that he has taken as much care of the bailor's goods as he has of his own (*Doorman* v. *Jenkins*, 2 A. & E. 256). Roman law was, perhaps,

different in this respect. For as by that law *lata culpa plane dolo comparabitur* (Dig. xi. 6, 1, 1), the fact that the bailee took the same care of the deposit as of his own property would go far to repel the presumption of *dolus* caused by the neglect (Story, s. 65).

As to theft, the bailee in English law is responsible for loss by theft either by his own servants or by others, if he have received the goods to keep safely (*Southcote's Case*, 4 Rep. 83); but if he have received the goods to keep as his own, he is not liable for theft, unless in the case of gross neglect (*Coggs* v. *Bernard*, 2 Ld. Raym. 913; Story, s. 72; *Giblin* v. *McMullen*, L. R. 2 P. C. 317).

Some of the points (not arising directly out of the text) in which the Roman and English law as to deposit differ are added here. (1) In the case of a *miserabile depositum*, or deposit made in a sudden emergency, such as fire or wreck, the depositor had an action *in duplum* (Bk. IV. Tit. VI. 23) in case of default by the depositary; in English law the remedy would be limited to damages coextensive with the wrong (Jones, 48). (2) In the case of deposit of a sealed box of valuables, the contents of which were unknown to the depositary, it is doubtful in Roman law whether he would be liable for the loss of the contents (Story, s. 75); in English law he would be bound only to such reasonable care as would be required in the case of articles of common value (s. 76). (3) In Roman law the use of the thing deposited without the consent of the owner constituted *furtum* (Dig. xvi. 3, 29), but in English law such use could not be larceny without the intent altogether to deprive the owner of his property in the deposit. Larceny by a bailee is punishable by 24 & 25 Vict. c. 96, s. 3. The cases upon the subject will be found in 2 Russell, bk. iv. ch. x. s. 3. See further Bk. IV. Tit. I. 1.

For *culpa* see Tit. XXV. 9.

4. For pledge see Bk. II. Tit. VIII. 1. The bailment being for the benefit of both parties, the pledgee is liable for ordinary neglect, therefore to a less extent than in Roman law, which demanded the same *exacta diligentia* which was necessary in the case of *commodatum*. The rule as to theft seems to be the same as in *commodatum*.

"Creditor and debtor are terms used more widely in Roman law than in our own. Every one who possessed a personal right against another was termed a *creditor*; and every one who owed the satisfaction of a claim, or was the subject of a personal right, was a *debitor*" (Sandars, *ad. loc.*).

## Tit. XV.

*Pr.* The *stipulatio* corresponds only to a small extent to the parol contract of English law. For the parol contract (1) may be either written or verbal; all contracts below the rank of contracts under seal are parol; "a written contract not under seal is not the contract itself, but only evidence, the record of the contract" (*Wake* v. *Harrop*, 6 H. & N. 775); (2) need not be by question and answer; (3) is the least solemn, while the *stipulatio* was the most solemn, form of contract.

Bracton (15 a) uses the term probably in a sense somewhat between the Roman and modern English use. A remnant of the *stipulatio*, filtered through the Canon Law, is perhaps discoverable in the marriage, baptismal, and coronation services of the Church of England. "Stipulation" is used in English law in a very general sense as meaning simply a bargain (Wharton, Law Lexicon). It occurs in statute law, *e.g.* Jud. Act, 1873, s. 25 (7).

Although the *stipulatio* has no counterpart in English law, many of the rules as to its validity, as to conditions precedent, etc., are capable of comparison with English rules of law, since the *stipulatio* was not so much a contract as a universal form by which any promise could be made binding in law (Hunter, 286).

1. The language in which a contract is made is immaterial in English law. Probably (though there seems to be no decision upon the point) different parts of a verbal contract may be in different languages. In the case of written contracts this is certainly the case; *e.g.* a bill of exchange, as in *Rouquette* v. *Overmann*, L. R. 10 Q. B. 525, may be written in English by the drawer, and accepted in French by the acceptor.

The rule as to *congruenter ad interrogata respondere* is practically the same in England. The minds of the contracting parties must be *ad idem*. "Where a contract is to be made out by an offer on one side and an acceptance on the other, if the answer is equivocal, or anything is left to be done, the two do not constitute a binding contract" (*Appleby* v. *Johnson*, L. R. 9 C. P. 158, Grove, J.).

2. So in English law a contract may be absolute or conditional. If there be no condition as to time or otherwise, the property immediately (in the case of a sale of goods) vests in the buyer, and a right of action for the price in the seller (*Gilmour* v. *Supple*, 11 Moo. P. C. 566).

With regard to contracts to be fulfilled by a certain day, the rights of the parties depend upon the intention of the parties to make time of the essence of the contract. Formerly, time was always of the essence of the contract at law; *e.g.* in a sale of real estate, if a day was fixed for completion, unless the vendor made out a good title by that day, the purchaser was entitled to rescind the

contract. But it was otherwise in equity, where the intention of the parties was regarded. And in equity time was of the essence of the contract in certain cases, *e.g.* the sale of a life annuity, of a publichouse as a going concern, or of a house for the purpose of residence (see 1 Dart. ch. x. s. 1). Now, by the Jud. Act, 1873 (s. 25 (7)), "stipulations in contracts as to time or otherwise, which would not before the passing of this Act have been deemed to be, or have become, of the essence of such contracts in a court of equity, shall receive in all courts the same construction and effect as they would have heretofore received in equity."

In English law a contract must, in general, be performed strictly on the appointed day, even though its non-performance may cause a forfeiture (Chitty, ch. v.). In the case of bills of exchange, the nominal day of payment is not the real one, owing to days of grace being allowed (45 & 46 Vict. c. 61, s. 14). With regard to rent, it is *due* in the morning of the day appointed for payment, but is not *in arrear* till after midnight (Woodfall, ch. x. s. 3). In some cases, such as the presentment of a bill of exchange at a banker's, the act must take place "at a reasonable hour on a business day" (45 & 46 Vict. c. 61, s. 45). But in most cases by English law as by Roman, the party bound is allowed the whole day for the fulfilment of his obligation. In one case the promisee may have an action for non-performance of the contract before the day of performance arrives. That is where the party bound to performance announces prior to the time his intention not to perform it (see *Hochster* v. *De la Tour*, 2 E. & B. 678; *Frost* v. *Knight*, L. R. 5 Ex. 322; L. R. 7 Ex. 111).

3. A contract for the payment of a sum of money by way of annuity is good by English law. The extinction of a debt by lapse of time, unknown in Roman law

unless by the operation of an *exceptio*, is effected in England by the Statutes of Limitation.

4. The condition of a conditional contract may be either subsequent, concurrent, or precedent (Anson, pt. v. ch. iii. s. 2). The stipulations in the text would probably be regarded by English law as wagers. A wager is a promise to pay money upon the determination of an uncertain event, and so far every wager is a conditional contract. What distinguishes wagers from other conditional contracts is that wagers as such are not enforceable, owing to the intervention of statute law. By 8 & 9 Vict. c. 109, s. 18, all contracts or agreements by way of gaming or wagering are null and void, with an exception in favour of contributions towards plate, prizes, or money to be awarded to the winner of any lawful game.

The benefit of a conditional contract would pass in English law to the personal representatives, provided that the condition was not made impossible by any act of the deceased, and did not depend in any way upon his personal skill or taste (Chitty, ch. i. s. 3).

5. The law is no doubt the same in England. Physical impossibility avoids a contract (Pollock, ch. vii.). In the case of a bill of exchange accepted payable at a particular place, the acceptance is general (*i.e.* the bill need not necessarily be presented at that place), unless it expressly states that the bill is to be paid there only and not elsewhere (45 & 46 Vict. c. 61, s. 19).

6. These examples seem to be wagers. The last sentence of this paragraph may be illustrated in English law by the case of *Bradford* v. *Symondson*, 7 Q. B. D. 456. There a shipowner, who had insured a cargo for a certain voyage, believing the vessel to be overdue, effected a policy of reinsurance with the same insurer. Before effecting the latter policy the vessel and cargo

had arrived safely at their destination. It was held that, inasmuch as this fact was unknown to both parties, the policy of reinsurance had attached. Here the arrival of the vessel was certain in itself, but uncertain as far as the knowledge of the parties extended.

7. In England, the fulfilment of a contract may be secured by the imposition of a penalty. Here, however, the rule (apparently unknown to Roman law) comes in, *viz.* that "penal provisions inserted in instruments to secure the payment of money or the performance of contracts will not be literally enforced, if the substantial performance of that which was really contemplated can be otherwise secured" (Pollock, ch. viii.). The question is whether the sum named is to be regarded as liquidated damages, that is, the sum agreed upon in the contract by the parties themselves as the damages for a breach of it, or as a penalty, that is, a sum in excess of the actual loss likely to be sustained. In the former case the sum fixed may be recovered, in the latter only such a sum as represents the loss actually sustained. English law inclines to treat a fixed sum rather as a penalty, and so to be relieved against, than as liquidated damages (Chitty, ch. viii.). *Kemble* v. *Farren*, 6 Bing. 147, is the leading case upon the subject. The law is fully discussed by Jessel, M.R., in *Wallis* v. *Smith*, 21 Ch. D. 243. The most important application of the principle is in the case of mortgages, where, in direct violation of the form of the contract, equity compels the mortgagee to reconvey on being paid his principal, interest, and costs (Pollock, *ubi supra*).

## Tit. XVI.

1. In the case of a joint contract in English law all the joint contractors must join in suing, and all must be sued during their joint lives. But each is liable for the whole debt, so that a release of one discharges all; and a judgment, though unsatisfied, against one joint contractor bars proceedings against another (*Kendall* v. *Hamilton*, 4 App. Cas. 504). A liability which is both joint and several is more common than one which is simply joint. In this case the creditor may sue all jointly, or each individual separately, at his option (see Williams, P. P., pt. iv. ch. ii.). In such a case the debtor sued may claim contribution from those who have not been sued (Chitty, ch. iii. s. 5).

2. Compare the case of two persons joining in a joint and several promissory note, the one as principal, the other as surety, the latter joining only upon the understanding that the principal debtor was to be called upon for payment within a certain time (*Lawrence* v. *Walmsley*, 12 C. B. N. S. 799). Here one of the joint contractors contracted absolutely, the other *sub conditione.*

## Tit. XVIII.

1. With *judiciales stipulationes* may be compared the recognisances of English law, termed by Blackstone a species of "preventive justice." "This preventive justice chiefly consists in obliging those persons whom there is a probable cause to suspect of future misbehaviour to *stipulate* with and to give full assurance to

the public that such offence as is apprehended shall not happen" (4 Stephen, bk. vi. ch. xiii.). Such assurance is given by securities or recognisances either to keep the peace or for good behaviour. Recognisances are also entered into by witnesses and in other cases, for which see Stephen, *ubi supra*. Recognisances, like *judiciales stipulationes*, are a kind of contract entered into at the instance of a judicial officer rather than by convention of the parties. They fall in English law under the head of contracts of record (see note to Tit. XIV. 2).

2. The *prætoriæ stipulationes* resemble to some extent injunctions. For (1) injunctions were formerly peculiarly within the equitable jurisdiction of the Court of Chancery (but see now Jud. Act, 1873, s. 25 (8)), as the *prætoriæ stipulationes* were within that of the prætor; (2) the procedure was not unlike that in the undertaking as to damages: where an application for an injunction is made *ex parte*, the Court generally grants only an interim order, and the plaintiff is required to give an undertaking as to any damages the defendant may be put to by reason of the interim order (2 Daniell, ch. xxxvi. s. 2); (3) an injunction, interim or otherwise, may be granted not only against the continuance of existing injury, but the commission of apprehended injury (*damnum infectum*). Thus the Chancery Division has granted injunctions against apprehended waste (Woodfall, ch. xvi. s. 5), or against the threatened publication of a libel (*Quartz Hill Gold Mining Co.* v. *Beall*, 20 Ch. D. 501).

In another aspect injunctions are to be compared with *interdicta* (see Bk. IV. Tit. XV.).

For *damnum* see Bk. IV. Tit. IV. *Pr.*

## Tit. XIX.

*Pr.* In English law, things which are not *in dominio nostro* may be the subject of contract. Thus a contract which engages to transfer to a purchaser or mortgagee property of which the vendor or mortgagor is not possessed at the time will transfer the beneficial interest immediately on the property being acquired by him (*Holroyd* v. *Marshall*, 10 H. L. C. 191).

1. The rule seems to be the same in English law as to a contract for a thing physically impossible (Pollock, ch. vii.). Where the continued existence of a specific thing is essential to the performance of a contract, the parties are excused if, before breach, performance becomes impossible from the perishing of the thing without default of the contractor (*Howell* v. *Coupland*, 1 Q. B. D. 258).

2. "If the thing . . . cannot be the subject of private ownership at all (as the site of a public building, the Crown jewels, a ship in the Royal Navy), the agreement is impossible in law" (Pollock, *ubi supra*).

3. In English law A may contract with B that C shall do something. Thus, a *del credere* agent guarantees to his principal due payment of the price of goods sold by the agent to third persons (Chitty, ch. iii. s. 4).

4. In English law a man cannot acquire rights or incur liabilities from a contract to which he was not a party, except in the case of joint stock banking companies, trades' unions, etc., who are enabled to sue and be sued in the name of an individual appointed in that behalf. The cases of principal and agent and trustee and *cestui que trust* are only apparent exceptions to this rule (Anson, pt. iii. ch. i. s. 2). For instance, a master cannot maintain an action for *per quod servitium amisit*

against a railway company for an injury to his servant caused by their neglect of duty, unless the master was a party to the contract (*Alton* v. *Midland Ry. Co.*, 19 C. B. N. S. 213). There are old cases, such as *Dutton* v. *Poole*, 1 Vent., 318, where a child or near relation has been permitted to sue upon a contract for his benefit (see 2 Spence, 276); but such cases are no longer good law, and the only advantage that children now have over persons not relations is that provisions in a marriage settlement for their benefit may be enforced by them (Pollock, ch. v.). Where the contract is assignable, the assignee may sue in his own name (Jud. Act, 1873, s. 25, (6)).

5. In English law the acceptance of a proposal must be absolute and identical with the terms of the proposal (Anson, pt. ii. ch. i. s. 2). Thus, where the defendant agreed to give twenty guineas for a mare if warranted sound and quiet in harness, and the plaintiff warranted her sound and quiet in double harness, it was held that there was no complete contract (*Jordan* v. *Newton*, 4 M. & W. 155). So a contract is incomplete if one of the parties add a condition to which the other does not assent, as in *Wontner* v. *Shairp*, 4 C. B. 404, 441, where the plaintiff applied to a provisional committee for shares in a proposed company, and the committee informed him that they have allotted him the shares, on condition that the deposit was paid on or before a certain day, in default of which the allotment would be forfeited.

7, 9, 10. See Bk. I. Titt. XXI., XXIII.

8. The law is practically the same in England. A lunatic cannot marry or make a will except during a lucid interval (2 Stephen, bk. iii. ch. ii.), nor can he give a vote at a parliamentary election (*id.*, bk. iv. ch. i.). With regard to contracts, an executed contract

entered into *bonâ fide* and in the ordinary course of business is not void by reason of one of the parties having been at the time of such contract of unsound mind, where such unsoundness was not known to the other party (*Molton* v. *Camroux*, 2 Exch. 487; 4 Exch. 17). Where a husband gave authority to his wife to purchase goods, then became insane, and afterwards recovered his reason, he was held to be liable for the price of goods supplied to his wife during his insanity (*Drew* v. *Nunn*, 4 Q. B. D. 661).

11. The English law as to impossible conditions (at any rate in bonds, with which the old learning on this subject chiefly deals) is, "if a man be bound in an obligation with condition that if the obligor do go from the church of St. Peter in Westminster to the church of St. Peter in Rome within three hours, that then the obligation shall be void. The condition is void and impossible, and the obligation standeth good" (Co. Litt., 206 b). But subsequent impossibility is a discharge of the obligation (Pollock, ch. vii.). With regard to conditions not contained in bonds, probably English law follows Roman, and the contract is void, as being founded upon an unreal consideration (see Anson, pt. v. ch. iv.). From the nature of the case, reported decisions upon such matters are scarcely likely to be found.

13. A contract of life-assurance, where the assurance is on the life of the assurer, resembles the *stipulatio post mortem dari sibi*. It is a contract from which one of the contracting parties cannot personally receive any benefit; the contract is for the advantage of his estate or his creditors, not himself, and no cause of action upon the policy arises till his death. In the case of an ordinary contract, "it is admitted law that, if a man who makes an offer dies, the offer cannot be accepted after he is

dead" (Mellish, L.J., in *Dickinson* v. *Dodds*, 2 Ch. D. 475).

There is little doubt that a contract to do something the day before the death of either of the parties would, in England, be void for uncertainty.

14. A very similar contract in English law is one by which freight is prepaid, that is, money is paid before the event on which the earning of it depended has happened. In the particular case of an advance on account of freight to be earned, the payment is irrevocable, and not a loan repayable by the borrower if freight be not in fact earned (*Allison* v. *Bristol Marine Insurance Co.*, 1 App. Cas. 209). It is *debitum in futuro solvendum in præsenti* (*id.*, 250, Lord O'Hagan).

15. A contract to leave money by will is good in English law if it fulfil the requirements of a valid contract as to consideration, etc. See an example in *Humphreys* v. *Green*, 10 Q. B. D. 148.

16. An example of a contract to pay a sum after the death of a third person is found in the common form of marriage settlement, by which a sum of money is payable by trustees to the husband or wife during his or her life, and after his or her death to the survivor.

17. Compare the presumption of English law that a deed thirty years old proves itself, and no evidence of execution is necessary (Buller, N. P. 255).

18. In English law, A may contract for B, as in the case of agency (see Tit. XXVI.; Bk. IV. Tit. X.)

22. A similar principle obtains in English law. It has been held that if a purchaser buy what is in fact his own estate, he can recover his purchase-money (2 Dart, ch. xiv. s. 8). The contract is void both for impossibility and for want of consideration (Pollock, ch. vii.).

23. The English rule is the same, and is illustrated

by the case of *Raffles* v. *Wickelhaus*, 2 H. & C. 906. There in a contract for the sale of a cargo of cotton, "to arrive ex *Peerless* from Bombay," it happened that there were two ships of the name, and that the buyer meant one and the seller the other. It was held that no valid contract was made.

24. "If one bind himself to kill a man, burn a house, maintain a suit, or the like, it is void" (Shep. Touchst. 370). So no right of action can arise for work done in printing a work of a libellous nature (*Poplett* v. *Stockdale*, R. & M. 337).

25. It is a presumption of English law that the parties to a contract bind not only themselves but their personal representatives (Chitty, ch. i. s. iii. 4), so that a conditional contract may be enforced by or against such representatives, unless the condition was such that it must *ex necessitate rei* be fulfilled in the lifetime of the deceased. See note on Bk. IV. Tit. XII. 1.

26. See note on Tit. XV. 2.

27. This seems not to agree with English law (see note on Tit. XXIII.).

## Tit. XX.

*Pr.* The surety of English law corresponds very nearly to the *fidejussor*. The English rules as to a covenant not to sue and as to a surety's right to have assigned to him the securities held by the creditor on discharging the debt (19 & 20 Vict. c. 97, s. 5) are, no doubt, based on the Roman law of *pactum de non petendo* and *beneficium cedendarum actionum*. Some of the points in which Roman and English law differ are these:

(1) The Roman surety was originally limited to *stipulationes* under the name of *adpromissor* on the one side, *sponsor*, or *fidepromissor*, on the other, till, finally, the *fidejussor* superseded the more ancient forms; there seems never to have been any limitation of the English surety to any particular form of contract. (2) Women could not be *fidejussores*, except in a few instances (Hunter, 393), but they may be sureties. (3) In Roman law the principle of *beneficium excussionis* applied (Nov. 4, 1), *i.e.* the creditor was bound to proceed against the principal debtor first; in England the surety may be sued before default of the principal, unless the terms of the guarantee require recourse to the principal first; but the surety may give notice to the principal requiring him to defend, and if the principal do not defend, he is estopped from saying that the surety was not bound to defend (*Duffield* v. *Scott*, 3 T. R. 374; see *Gray* v. *Lewis*, L. R. 8 Ch. 1035). (4) Contribution was secured to a *fidejussor*, where there was neither partnership nor express *mandatum*, by the *beneficium cedendarum actionum* (Poste on Gaius, iii. 127); the English surety is entitled to have assigned to him all securities in the hands of the creditor (19 & 20 Vict. c. 97, s. 5). (5) By English law a contract of guarantee must be in writing (29 Car. II. c. 3, s. 4), and there must be a consideration, though since 19 & 20 Vict. c. 97, s. 3, the consideration need not appear in writing; this was, of course, not the case in Roman law, where the contract was originally necessarily verbal, and no consideration was requisite. (6) A *fidejussor* might be liable where the principal was not, as in the case of a *naturalis obligatio* (Mackenzie, pt. iii. ch. iii.), but a surety cannot be so, for there can be no surety unless there be a principal debtor (*Lakeman* v. *Mountstephen*, L. R. 7 H. L. 17). Thus a guarantee for the price of goods

not necessaries supplied to an infant is not collateral, and, therefore, not within the Statute of Frauds (*Harris* v. *Huntback*, 1 Burr. 373). (7) A *fidejussor* was not discharged, though the benefit of a security was lost to him by the laches of the creditor; this is not so in England. The difference is pointed out in *Macdonald* v. *Bell*, 3 Moo. P. C. 315. (8) There are a number of cases of implied indemnity in English law unknown to Roman law (see Chitty, ch. iii. s. ii. 6, for examples).

2. The death of the surety does not *per se* operate as a revocation (Smith's Mercantile Law [8th edit.], 468). Whether a guarantee is revoked or not by the death of the guarantor seems to depend upon the construction of the contract (see *Coulthart* v. *Clementson*, 5 Q. B. D. 42; *Lloyd's* v. *Harper*, 16 Ch. D. 290; *Beckett* v. *Addyman*, 9 Q. B. D. 783). If not revoked, the rights and liabilities under the contract pass to the personal representatives.

3. So in English law a surety may guarantee a past, present, or future debt incurred by another, but in the case of a past debt the promise is not binding, unless there be some new consideration, such as forbearance or future advances (Chitty, ch. iii. s. ii. 6). The principal debtor may be constituted by matters *ex post facto* (*Lakeman* v. *Mountstephen*, L. R. 7 H. L. 17).

4. A surety is not necessarily liable for the whole debt where there are co-sureties, unless he enters into a joint or joint and several contract (see note on Tit. XVI. 1). The surety paying more than his aliquot share is entitled to contribution from his co-sureties (*Dering* v. *Earl of Winchelsea*, 1 White & Tudor, L. C.), on the principle of the *beneficium divisionis* of Roman law (Hunter, 398).

In case of insolvency of any of the co-sureties, the surety entitled to contribution may put the insolvent

sureties out of the question and demand contribution from the solvent, as if they were the only sureties (Snell, pt. iv. ch. v.). It was formerly otherwise at law, but the rule of equity prevails since Jud. Act, 1873, s. 25 (11).

5. As the contract of guarantee is only a collateral engagement, the surety cannot be liable for a larger sum than the principal debtor, but he may be liable for less, *e.g.* the case of members of a company undertaking to guarantee the fidelity of persons in responsible positions, as in *Carpenter* v. *Solicitor to the Treasury*, 7 P. D. 235.

The principal may promise absolutely and the surety conditionally, and *vice versâ*, as in Roman law. Thus in *Evans* v. *Bremridge*, 25 L. J. Ch. 102, 334, one of two intended co-sureties executed an instrument of guarantee on condition that the other co-surety would be a party to it. So a surety may guarantee for a limited time or for a limited amount (see cases in Chitty, ch. iii. s. ii. 6).

8. See note on Tit. XIX. 17. The maxim on which corresponding rules of evidence in English law are based is, *Omnia præsumuntur rite et solenniter esse acta* (Co. Litt. 6 b).

## Tit. XXI.

Lord Coke identifies the English deed with *literarum obligatio* (Co. Litt., 171 b). So Bracton (99 b) probably means a deed when he speaks of *stipulatio per scripturam*. There seems to be no kind of resemblance between *literarum obligatio*, *stipulatio per scripturam*, and a deed, other than that they were all modes of determining the legal relations of the parties.

An English example of an acknowledgment of a debt where no debt exists is afforded by the case of an accommodation bill. An accommodation party is liable upon the bill to a holder for value (45 & 46 Vict. c. 61, s. 28), that is to say, he cannot be heard to declare that he has not received value for it, and is in a position not unlike that of the person in the text who is debarred from using the *exceptio non numeratæ pecuniæ.*

## Tit. XXII.

In all consensual contracts, except *mandatum*, valuable consideration is necessary (Hunter, 362). But though such was the case in fact, the Romans never formally acknowledged as a principle of law anything corresponding to the English theory of consideration (see note on Tit. XIV. 2). So far, then, as the four consensual contracts were made without conscious acknowledgment of the necessity for consideration, they have no counterpart in English law, except the *mandatum.* This is gratuitous in both English and Roman law, so that the law upon the subject is practically the same in both systems. It may be that the classification of *mandatum* among consensual contracts was one reason for the Romans failing to recognize consideration as the common element which gave them their validity.

## Tit. XXIII.

*Pr.* It will, perhaps, be useful to give a short summary of the main points of difference between the Roman and English contract of sale. (1) *Arra* differed from

earnest; (2) the price must be certain in Roman law; (3) there was a difference in the law as to written contracts (see the following notes for a more full discussion of these points); (4) there was no warranty of title in Roman law, the contract was not *rem dare*, but *præstare emptori rem habere licere;* the transfer was of *vacua possessio*, not of ownership (Benjamin, bk. ii. ch. vii.). The rights of the buyer were secured by an implied covenant against eviction, *duplæ stipulatio*, unless there were a special contract to another effect (Hunter, 330). The English rule as to personalty since *Eichholz* v. *Banister*, 17 C. B. N. S. 708, is thus laid down by Mr. Benjamin: "A sale of personal chattels implies an affirmation by the vendor that the chattel is his, and therefore he warrants the title, unless it be shown by the facts and circumstances of the sale that the vendor did not intend to assert ownership, but only to transfer such interest as he might have in the chattel sold" (Benjamin, bk. iv. pt. ii.). As to realty, it may be said generally that there is no warranty of title; a strict investigation of the vendor's title by the purchaser and the covenants for title implied in the sale (for which see the Conveyancing Act, 1881, 44 & 45 Vict. c. 41, s. 7) supply the place of a warranty (Williams, R. P., pt. v.). English law thus approaches Roman more nearly in the sale of real than of personal property. (5) There was a warranty of quality in Roman law. The seller was bound to suffer rescission, or give compensation, at the option of the buyer, if the thing sold had undisclosed faults which hindered his free possession of it, even where there was no *dolus* (Hunter, 326). In English law, *caveat emptor* is the general rule in the sale of goods. "Where goods are *in esse*, and may be inspected by the buyer, and there is no fraud on the part of the seller, the maxim *caveat emptor* applies,

even though the defect which exists in them be latent, and not discoverable upon examination, at least where the seller is neither the grower nor the manufacturer" (*Jones* v. *Just*, L. R. 3 Q. B. 202). This does not apply to a sale of goods where the buyer has no opportunity of inspection (*ibid.*), or to executory contracts for the supply of particular goods from a manufacturer or dealer (*ibid.*). If a sale of an article be made "with all faults," the buyer has no remedy, even though the article be totally worthless, if no artifice was used to conceal defects (*Ward* v. *Hobbs*, 4 App. Cas. 13). See further Benjamin, pt. iv. ch. ii. The rule in the sale of real property seems practically the same as far as regards patent defects, but as to latent defects, a vendor cannot rely upon the aid of a Court of Equity if he omit to disclose a latent defect which the purchaser has no means of ascertaining, even though the estate be sold subject to all faults (1 Dart, ch. ii. s. 1). In both Roman and English law the maxim *simplex commendatio non obligat* applies (Chitty, ch. iii. s. ii. 2; 1 Dart, ch. iii. s. 2). See the judgment of Cockburn, C.J., in *Smith* v. *Hughes*, L. R. 6 Q. B. 606. (6) By Roman law the property did not pass until *traditio* was made (Mackenzie, pt. iii. ch. iv.). And even after *traditio* it was only the property in a modified sense that passed; it was rather *vacua possessio* secured by *duplæ stipulatio* (see above). In England, the rule is quite different. In the case of realty, the purchaser is, upon the contract, entitled to the estate, and the vendor to the purchase-money, subject to the payment of which he holds the estate as a quasi-trustee for the purchaser (1 Dart, ch. vii. s. 1). In the case of personalty "by a contract for the sale of specific ascertained goods, the property immediately vests in the buyer, and a right to the price in the seller, unless it can be shown that such

was not the intention of the parties" (Sir C. Creswell in *Gilmour* v. *Supple*, 11 Moo. P. C. 566). (7) English law in general agrees with the rule in Dig. l. 17, 54, *Nemo plus juris ad alium transferre potest quam ipse haberet;* but in English law certain sales by persons not owners are good. In the case of personalty these are: (1) sales in market overt; (2) transfers of negotiable instruments or valuable securities under 24 & 25 Vict. c. 96, s. 100; (3) sales by a pawnee in default of payment, (4) by a sheriff, (5) by the master of a ship, (6) by a factor (Benjamin, bk. i. pt. i. ch. ii.). It is safe to say that (1), (2), and (4) of these exceptions would be unknown to Roman law.

As to earnest, it is laid down by Blackstone that "if the vendor says the price of the goods is £4, and the vendee says he will give £4, the bargain is struck; and if the goods be thereon delivered or tendered, or any portion of them, if such portion was accepted by way of earnest, or if the price be paid or tendered, or any part of the price be paid down and accepted (if it be but a penny), the property in the goods is thereupon transmuted, and vests immediately in the bargainee" (2 Stephen, bk. ii. pt. ii. ch. v.). He afterwards points out that this rule only applies to sales for ready money, not to sales upon credit. "Giving something in earnest to bind the bargain or in part of payment" is one of the alternatives necessary to a valid contract under the Statute of Frauds (29 Car. II. c. 3, s. 17). Earnest and part payment are not the same thing, as they might sometimes be in Roman law (Hunter, 332). There seems to be only one decision upon the meaning of earnest in the statute, viz. *Blenkinsop* v. *Clayton*, 7 Taunt. 597, where it was held that there must be an actual transfer of money, not a mere striking of money over the hand of the vendor. In Roman law the *arr*

was generally not money at all, but a ring (Sandars, *ad loc.*); and this was most likely the case in old English law (see Bracton, 61 b). Earnest, probably, does not of itself alter property; it is the contract and not the earnest that determines the property (Benjamin, bk. ii. ch. iv.). In the case of real property the deposit is rather a part payment than an earnest. The word earnest is certainly never used in connection with the sale of real property, while *arra* applied equally to movables and immovables. So far as *arra* was evidence of the bargain, it was not unlike the English earnest; so far as either party might rescind on forfeiture of the *arra* or its value, it has no counterpart in the earnest (see Hunter, 332; Benjamin, bk. i. pt. ii. ch. v.). It is possible that earnest may have been at first the same as *arra;* the *arra* of Bracton (62 a) seems to be the Roman *arra.*

In Roman law, the written contract was optional, and simply an alternative of the *stipulatio.* In English law certain contracts are bound to be in writing, *e.g.* all those falling within s. 4 of the Statute of Frauds, or s. 17 of the same statute, unless they fulfil one of the other alternatives there named; all sales and transfers of ships or shares therein (17 & 18 Vict. c. 104, s. 55); all sales and assignments of copyright (5 & 6 Vict c. 45); and all promises to pay debts barred by the Statute of Limitations (9 Geo. IV. c. 14, s. 1). In Roman law, again, the contract must be signed by the parties themselves; in some cases in English law, *e.g.* contracts under the Statute of Frauds, and contracts to pay debts barred by the Statute of Limitations (19 & 20 Vict. c. 97, s. 13), the signature of an agent is sufficient.

1. The contract of sale in English law is a contract for the transmutation of property from one man to

another for a price (2 Stephen, bk. ii. pt. ii. ch. v.). But though there can be no sale without a price, it is not necessary that the price should be fixed. If nothing has been said as to price when a commodity is sold, the law implies an understanding that it is to be paid for at what it is reasonably worth (Benjamin, pt. i. ch. v.).

With regard to contracts falling under the Statute of Frauds, it has been held that where the contract is within s. 4, the price must be stated in the agreement or memorandum (*Blagden* v. *Bradbear*, 12 Ves. 466, where an auctioneer's receipt for the deposit on a sale of lands was rejected as evidence because it did not state the price). Where the contract is within s. 17, the price need not necessarily be stated upon the note or memorandum. Where the price is omitted, and it does not appear upon the evidence that any specific price was agreed upon, a reasonable price is presumed (*Hoadley* v. *McLain*, 10 Bing. 482); but where the memorandum is silent as to price, and it appears that a specific price was agreed upon, the memorandum cannot be given in evidence (*Goodman* v. *Griffiths*, 1 H. & N. 574).

In English, as in Roman law, the price was often left to be fixed by an independent valuer, as in *Thurnell* v. *Balbirnie*, 2 M. & W. 786.

2. In England an exchange and a sale are treated as different matters, the price in the one case being goods, in the other money. But the rules of law are the same in both cases (Chitty, ch. iii. s. ii. 1). Though the price to be paid is in part an article to be given in exchange, the entire contract is one of sale (*Bach* v. *Owen*, 5 T. R. 409). For the purposes of pleading, an exchange cannot be treated as a sale (*Harrison* v. *Luke*, 14 M. & W. 139). For the law as to exchange of real property, see 1 Stephen, bk. ii. pt. i. ch. xvii.

3. Although, on the principle of *res perit domino*, the vendor ought to have suffered the *periculum rei venditæ* until delivery, in reality the Roman law was the same as the English upon this point (Benjamin, bk. ii. ch. vii.). "The rule of law," says Bayley, J., in *Tarling* v. *Baxter*, 6 B. & C. 364, "is that where there is an immediate sale, and nothing remains to be done by the vendor as between him and the vendee, the property in the thing sold vests in the vendee, and then all the consequences resulting from the vesting of the property follow, one of which is that if it be destroyed the loss falls upon the vendee." Where anything remains to be done to the goods, such as appropriation of the amount required from a larger bulk, where the vendor reserves a *jus disponendi*, and in other cases where it appears that the intention of the parties was that the property should not pass, it does not so pass (Chitty, ch. iii. s. ii. 1). Where the contract is for the sale of real property the purchaser has, after contract and before conveyance, a species of equitable estate in the land, complete as between himself and the vendor, but not equivalent to the legal estate as against third parties (1 Dart, ch. vii. s. 2). From the time of the contract everything which forms part of the inheritance belongs to the purchaser, *e.g.* windfalls and the produce of timber cut. So the purchaser is bound to bear all accidental losses, such as destruction by fire (*ibid.*).

4. A sale may be conditional or unconditional in English law. An example of a conditional sale is *Logan* v. *Le Mesurier*, 6 Moo. P. C. 116, where timber was sold at a certain price, on condition that if the quantity turned out to be more than fifty thousand feet, the purchasers were to pay for the surplus; if less, the vendors were to refund the difference.

5. See note on Tit. XIX. 2. In English law the case

of *Attorney-General* v. *Mayor of Plymouth*, 9 Beav. 67, although not quite in point, illustrates the principle of the text. There a corporation was held incapable of contracting to sell property on account of a public duty which was cast upon it in respect of such property.

In English law the purchaser has three distinct remedies, if he has been induced to enter into a contract by the fraud or misrepresentation of the vendor. He may affirm the contract (it being not *ipso facto* void, but only voidable at his option), and insist, if that is possible, upon being put in the same position as if the representation had been true; or he may rescind the contract within a reasonable time after discovering the misrepresentation, unless it has become impossible to restore the parties to their original position, or unless any third person has in good faith and for value acquired any interest under the contract (Pollock, ch. x.); or he may claim damages in an action analogous to the old common law action of deceit. For the difference between such an action and an action for rescission, see *Arkwright* v. *Newbold*, 17 Ch. D. 301.

## Tit. XXIV.

The contract of *locatio conductio* falls within the class of bailments in English law, and corresponds with some closeness to the contract of hire. Hire may be defined as a contract whereby the use of a thing or the services and labour of a person are stipulated to be given for a certain reward (Story on Bailments, s. 368). Some of the chief points of difference between the Roman and English law are these: (1) The employer is in Roman law called *locator operis* but *conductor operarum;* the

ployee *conductor operis* but *locator operarum*. No h distinction of terms exists in English law (Story, 369). (2) Hiring is properly confined in English to personalty, "when *goods* are left with the bailee be used by him for hire" (Lord Holt in *Coggs* v. *nard*, 2 Lord Raym. 913); *locatio* applied equally to vables and immovables. (3) English law draws a tinction unknown to Roman law between the carrier l the common carrier. "It is a misapprehension," s Cockburn, C.J., in *Nugent* v. *Smith*, 1 C. P. D. , "to suppose that the law of England relating to liability of common carriers was derived from the nan law; for the law relating to it was first ıblished by our Courts with reference to carriers by d, on whom the Roman law, as is well known, ıosed no liability in respect of loss beyond that of er bailees for reward. In the second place, the nan law made no distinction between inevitable ident arising from what in our law is termed the t of God' and inevitable accident arising from er causes; but, on the contrary, afforded immunity the carrier without distinction, whenever the loss ılted from *casus fortuitus*, or, as it is also called, *ınum fatale*, or *vis major*—unforeseen and inevitable ident." The common carrier insures against loss of injury to goods entrusted to him, unless such loss injury be caused by the act of God or the king's mies. (For the meaning of "act of God," see . XIV. 2.) The carrier simply engages to use ıonable care, and does not warrant safe conveyance. ıordingly, the common carrier is at common law ıle if goods be stolen from him without his default, the carrier is not. An illustration of the difference ween the carrier and common carrier is afforded by way companies, who are common carriers of goods

but carriers of passengers (see Chitty, ch. iii. s. ii. 4; Story, s. 590; 2 Stephen, bk. ii. pt. ii. ch. v., etc.). (4) Certain cases of hiring are in English law governed by special statutory enactments, and so differ from the corresponding Roman law. Thus, the liability of a Roman innkeeper (*caupo*) as defined by Dig. iv. 9 was greater than that of an English innkeeper since the protection afforded him by 26 & 27 Vict. c. 41. Other illustrations are afforded by the Carriers' Act (11 Geo. IV. & 1 Will. IV. c. 68), the "equality clauses" in 8 & 9 Vict. c. 20 and in private Acts, the Railway and Canal Traffic Act, 1854 (17 & 18 Vict. c. 31), the Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104), etc. Additional differences will be found in the notes to the text of this Title.

*Pr.* By English law, the price need not be fixed, but may be implied, as in the case of sale. If labour is to be performed by an artisan, he is tacitly presumed to engage for the usual price paid for the like services at the same place according to the custom of the trade; in the case of the hire of goods, a reasonable price is presumed (Story, s. 375).

1. The rule as to the price depending upon the valuation of a third person has been adopted by Sir W. Jones; in fact, the whole of his work on Bailments is in close accordance with Roman law.

The principle stated by Story in the last paragraph no doubt applies here, so that in the cases in the text a reasonable remuneration would be presumed by English law.

3. Similarly in England there is little practical difference between a long term of, say, a thousand years and the fee simple (Williams, R. P., pt. iv. ch. i.). By the Conveyancing Act, 1881 (44 & 45 Vict. c. 41, s. 65), such terms may be in certain cases enlarged into the fee simple.

*Emphyteusis* has no exact counterpart in English law. It is interesting as the form of tenure which, if it did not directly suggest, at least influenced the development of the fief (Maine, ch. viii.). It resembled, on the one hand, a lease for a long term; on the other, an equitable estate, for the *emphyteuta* had his *utilis actio* if dispossessed. It resembled a copyhold so far as the *emphyteuta* was entitled practically to fixity of tenure, as long as he paid his quit-rent. Finally, it differed from any English form of tenure, in that the person letting the land upon such tenure was entitled to a right of pre-emption in case of sale and a certain control over the mode of cultivation (*ibid.*), for the *emphyteuta* was liable to forfeiture for waste, if he managed the property so as to reduce its value (Sandars on Bk. II. Tit. V. 6; Hunter, 219).

4. The distinction in the text is not formally recognized in English law (Story, s. 370 a).

5. The word *diligentissimus* in the text, says Sir W. Jones, imports no more than ordinary diligence (Story, s. 398). The hirer in England is bound only to use ordinary diligence, and is responsible for ordinary negligence. Thus, the hirer of a carriage by the year under an agreement to keep it in perfect repair is not liable for repairs made necessary by an accident, and not by his wilful default (*Reading* v. *Menham*, 1 M. & R. 234).

In one matter English law is more stringent than Roman. Where damage is committed by servants of the hirer, the hirer is in English law responsible if such damage was caused by their default and negligence; in Roman law he was only responsible in case he had been guilty of *culpa* in admitting careless servants into his house (Story, s. 400). But even in English law the master is not liable, unless the act was done

in the service of the master or in obedience to his orders. See *Rayner* v. *Mitchell*, 2 C. P. D. 357, for an example.

It may be noticed here that a bailee of goods may have his liability increased or diminished while he is still in possession of the goods by his changing the character in which he holds them. For instance, a railway company in possession of goods after completion of the transit may be freed from their liability as common carriers, and subject only to the less extensive liability of warehousemen, as in *Mitchell* v. *L. & Y. Ry. Co.*, L. R. 10 Q. B. 256.

6. In *locatio rei* in English law, it is probable that the rights of representatives remain, though either of the parties to the contract dies (Story, s. 420). But as to *locatio operis* or *operarum*, it is not so. Thus, in a contract for personal services, it is an implied condition that the death of either party shall dissolve the contract (*Farrow* v. *Wilson*, L. R. 4 P. C. 744), though the contract is not thereby rescinded so as to take away a right of action already vested (*Stubbs* v. *Holywell Ry. Co.*, L. R. 2 Exch. 311). The Roman law was the same (Sandars, *ad loc.*).

## Tit. XXV.

There does not seem to be any definition of *societas* in Roman law. Definitions by modern civilians will be found in the introductory chapter of Lindley. Lord Justice Lindley does not himself venture to define partnership as used in English law, but intimates that the definitions of the civilians are too wide for English partnership. Besides other differences which will be

found in the notes, the following may be mentioned as points of contrast between Roman and English law. (1) There was no limit to the number of partners in Rome; in England, since the Companies Act, 1862 (25 & 26 Vict. c. 89), partnerships of more than ten persons formed for the purpose of banking, and partnerships of more than twenty persons formed for the purpose of carrying on any other business for gain, must be registered under the Act (with certain exceptions), and if not so registered are illegal. (2) Roman law did not allow the bringing of an action in the name of a public officer; this is allowed in England in certain cases, *e.g.* banking companies governed by 7 Geo. IV. c. 46, but only where a statute gives such authority, for the members of a partnership cannot vest a right of action in one of themselves for convenience (*Evans* v. *Hooper*, 1 Q. B. D. 45). (3) In *societas* one partner could generally bind another only by express *mandatum* from the latter (Sandars on par. 2 of this Title). The English rule is that if an act is done by one partner on behalf of the firm, and it was necessary for carrying on the partnership business in the ordinary way, the firm will *primâ facie* be liable, although in point of fact the act was not authorized by the other partners (1 Lindley, bk. ii. ch. i. s. 1). (4) Consideration was not necessary for the establishment of *societas* as it is for a partnership (1 Lindley, bk. i. ch. ii. See note to Tit. XXII.). (5) It is doubtful whether there was in Roman law anything corresponding to the quasi-partnership or dormant partnership of English law, for which see Lindley, bk. i. ch. i. s. 2. (6) In Roman law partnership matters were not assigned to any particular tribunal; in England by the Jud. Act, 1873, s. 34 (3), causes and matters relating to the dissolution of partnership or the taking of partnership accounts are assigned to the

Chancery Division. (7) In Roman law the *beneficium competentiæ* (for which see note to Bk. IV. Tit. VI. 37) applied in actions between partners; there is no such privilege in English law.

*Pr.* English law agrees (1 Lindley, bk. i. ch. i. s. 4).

1. So in English law the shares are *primâ facie* equal, and losses of capital, like other losses, must be shared equally. Inequality must be proved by evidence (1 Lindley, bk. iii. ch. v. s. 2).

2. "Profits may be shared by those who make no advances, and persons may stipulate for a division of gain, if any, and yet some one or more of them may by agreement be entitled to be indemnified against losses by the others, so that whilst all share profits, some only bear losses" (1 Lindley, bk. i. ch. i. prelim.).

4. An English partnership is determinable at the will of any of the partners, unless it has been agreed that it shall endure for a specified time (1 Lindley, ch. viii. s. 1), or unless there are special provisions in the articles as to the retirement of a partner (*id.*, bk. iii. ch. v. s. 7).

The case put in the text is not unlike that of reopening accounts on the ground of fraud, even after the retirement of a partner (see 2 Lindley, bk. iii. ch. x. s. 5; *Williamson* v. *Barbour*, 9 Ch. D. 529).

5. The grounds for dissolution of a partnership are thus tabulated by Lord Justice Lindley (besides mutual consent, and the occurrence of events specially made grounds for a dissolution): (1) the will of any partner, (2) the impossibility of going on, (3) the transfer of a partner's interest, (4) death, (5) the occurrence of some event which renders the continuance of the partnership illegal, (6) fraud vitiating the original contract (1 Lindley, bk. i. ch. viii. s. 2). These seem to agree substantially with the grounds as given in Dig. xvii. 2,

63, 10, *ex personis*, *ex rebus*, *ex voluntate*, and *ex actione*, except that the latter ground would be in English law regarded rather as a mode than as a ground of dissolution.

6. So in English law, if two solicitors, not partners, are jointly retained to conduct a particular case, and they agree to share the accruing profits, they become partners *pro hac vice*, but no further (*Robinson* v. *Anderson*, 20 Beav. 98).

7. The text corresponds roughly to the English law, by which a partnership may be dissolved, if one of the partners is a convict, under 33 & 34 Vict. c. 23 (1 Lindley, ch. iii. s. 2), although his share in the partnership does not now vest in the Crown as it did before 1870 (*ibid.*).

8. An English partnership is dissolved by bankruptcy of one of the partners; this falls within the third ground of dissolution mentioned in the note to par. 5.

9. The English rule is thus given in *Bury* v. *Allen*, 1 Coll. 604: "Suppose the case of an act of fraud, or culpable negligence, or wilful default by a partner during the partnership to the damage of its property or interests in breach of his duty to the partnership, whether at law compellable or not compellable, he is in equity compellable to compensate or indemnify the partnership in this respect." Accordingly a partner cannot charge to the firm a debt alleged to be due from it which he paid in his own wrong (*Re Webb*, 2 J. B. Moore, 500).

The last sentence of the paragraph is exactly illustrated in English law by the case of *Atwood* v. *Maude*, L. R. 3 Ch. 469, where it was held that a solicitor taking into partnership another solicitor of whose incompetence he had had ample means of judging, could not set up such incompetence as a ground for dissolving

the partnership, and at the same time retaining the premium.

*Culpa* is the same as negligence in English law (Campbell on Negligence, s. 2). Roman law recognized only two degrees of *culpa*, *culpa lata* and *culpa levis*, to which the civilians added a third, *culpa levissima;* but the last is only used once in Roman law (Dig. ix. 2, 44), and then not in a technical sense. *Culpa lata*, or *crassa negligentia* (the terms are used by Tindal, C.J., in *Godefroy* v. *Dalton*, 6 Bing. 467), and *culpa levis* are represented in English law by gross and ordinary negligence. The term "gross negligence" has been objected to as misleading. It is ordinary negligence with a vituperative epithet, according to Lord Cranworth in *Wilson* v. *Brett*, 11 M. & W. 113; it is the absence of such care as it was the duty of the defendant to use (*Grills* v. *General Iron Screw Collier Co.*, L. R. 1 C. P. 612). It includes, says Mr. Campbell, both *culpa lata* and considerable or palpable negligence (s. 11). As far as bailees are concerned, the case of *Giblin* v. *McMullen*, L. R. 2 P. C. 336, may be referred to. "Of course," says Lord Chelmsford in his judgment, "if intended as a definition, the expression 'gross negligence' wholly fails of its object. But as there is a practical difference between the degrees of negligence for which different classes of bailees are responsible, the term may be usefully retained as descriptive of that difference, more especially as it has been so long in familiar use and has been sanctioned by such high authority as Lord Holt and Sir W. Jones." It is obvious that in every case the amount of negligence must depend upon the circumstances; it is impossible to say that a certain course of conduct is in itself gross negligence or not. In fact, it is difficult to frame a more close definition than that attempted by Alder-

son, B., in *Blyth* v. *Birmingham Waterworks Co.*, 11 Exch. 481: "The definition of negligence is the omitting to do something that a reasonable man would do, or the doing something that a reasonable man would not do; and an action may be brought if thereby mischief is caused to a third party not intentionally." As *culpa lata* in some cases is considered practically equivalent to *dolus* (Dig. xi. 6, 1, 1; *magna culpa dolus est*, Dig. l. 16, 226), so in English law negligence may carry with it the *indicia* of fraud; thus a case of fraud is constituted where statements false in fact are made by persons who believe them to be true when it was their duty to have known them to be false (Snell, pt. iv. ch. iii.). In *Ratcliffe* v. *Barnard*, L. R. 6 Ch. 654, James, L.J., speaks of "wilful negligence which leads the Court to conclude that the person is an accomplice in the fraud." For a statutory use of the term "negligence," see the Employers' Liability Act, 1880 (43 & 44 Vict. c. 42, s. 2 (I)).

## Tit. XXVI.

*Pr.* A mandate in English law is "a bailment of goods without reward, to be carried from place to place, or to have some act performed about them" (Story on Bailments, s. 5). The law, as a rule, agrees with the Roman law upon the subject, and is founded upon it. Some of the differences are these: (1) *Mandatum* was not confined to personal property, as mandate is (Story, s. 141). (2) Mandate without delivery would be rather agency than bailment, *i.e.* it would fall under a class of contracts different from that under which *mandatum* falls (s. 142). (3) The mandatary in Roman law was

liable for both misfeasance and nonfeasance; in English law he is liable (though the line of distinction is very fine in some cases) only for misfeasance (s. 164), for nonfeasance is simply the breaking of a gratuitous executory contract which is void if not under seal (s. 169). The cases of *Coggs* v. *Bernard*, 1 Smith, L. C., *Wilkinson* v. *Coverdale*, 1 Esp. 75, illustrate misfeasance; *Balfe* v. *West*, 13 C. B. 466, nonfeasance. (4) The amount of diligence required from the mandatary appears to be greater in Roman than in English law, though the amount requisite in the former does not appear very clearly (Story, s. 173). In English law he is not liable for misfeasance, unless there be bad faith or gross negligence (*Shiells* v. *Blackburne*, 1 H. Bl. 158). A stage coachman is not liable for the loss of a parcel which was entrusted to him to carry without reward, unless there has been great carelessness in his conduct (*Beauchamp* v. *Powley*, 1 M. & R. 38).

In the French code, the law of agency falls under the head of *mandat* (s. 1984). There is, however, a wide difference between the Roman *mandatarius* and the paid agent in modern times: the former was *primâ facie* a friend who accepted the responsibility as one binding only in honour; the latter is a man who contracts for good consideration to use his skill on behalf of his principal. The legal relations of the *mandator* and *mandatarius* were only tardily recognized by the prætor, and were unknown to the *jus civile;* the legal relations of principal and agent early formed part of the English common law. Agency, according to English legal conceptions, would fall rather under the head of *locatio* than *mandatum* (Story on Agency, s. 4). For the right of action upon a contract made by an agent, see note to Bk. IV. Tit. X.

The English law of mandate generally agrees, as in

the other cases of bailment, with Roman law. Some writers, *e.g.* Holmes (lect. v.), find a Teutonic rather than a Roman origin for the English bailment.

5. Some of the chief points of difference between Roman and English law as to interest are these: (1) The maximum of *usuræ* was fixed by law at twelve per cent. *per annum* (Cod. iv. 32, 26, 1). In England the usury laws were repealed by 17 & 18 Vict. c. 90, so that now there is no legal prohibition against an agreement for any rate of interest, however high. But in the case of expectant heirs or reversioners, relief against unconscionable interest is given by Courts of Equity, as in *Nevill* v. *Snelling*, 15 Ch. D. 679, where promissory notes for sums bearing interest at from one hundred to a hundred and twenty per cent. were declared by the Court to stand as security only for the sums actually advanced with interest at five per cent. (2) Compound interest (*anatocismus*) was forbidden by Roman law (Cod. iv. 32, 28); by English law it is not illegal, but is not in general available, except perhaps in the case of mercantile accounts current for mutual transactions (*Fergusson* v. *Fyffe*, 8 C. & F. 140). (3) *Usuræ* ran at five per cent. upon judgments, beginning after four months from the date of the judgment (Cod. vii. 54, 2); in England interest runs upon judgments at four per cent. from the time when the judgment was entered up, unless there be an agreement between the parties that a higher rate shall be paid (Jud. Act, 1875, Ord. xlii. r. 14).

6. The law as to advice is the same in England (Story on Bailments, s. 220).

8. Probably English law agrees, judging from the analogy of the law of principal and agent. If an agent be appointed for a special purpose, the principal is not bound by an act of the agent not warranted by the

authority delegated to him (Chitty, ch. ii. s. 1, 1). Thus, if a purchaser take a warranty of a horse from the servant of a private person, he is at the risk of being able to prove that the servant had his master's authority (*Brady* v. *Todd*, 9 C. B. N. S. 605).

9. English law agrees (Story on Agency, s. 202).

10. A mandate in English law is dissolved by the death of the *mandator* or mandatary, as, the contract being founded in personal confidence, it is not supposed to pass to representatives (*ibid.*). As to an act done *bonâ fide* by the *mandatarius* after the death of the *mandator*, English law differs from Roman; for in English law the power to be executed can exist only while the party in whose name it is to be done is in existence (s. 205). For an example of the same rule in the case of agency, see *Smout* v. *Ilbery*, 10 M. & W. 1. Where, however, the authority is coupled with a vested interest in the thing as to which the authority is given, it is not necessarily extinguished by the death of the *mandator* (Story, s. 496).

13. See note on *Pr.*

The *mandator*, though he could not remunerate the *mandatarius eo nomine*, might give him a *honorarium* in gratitude for his services. Those who exercised liberal professions could not sue for their *honoraria*, but the magistrate pronounced *extra ordinem* upon them (Sandars, *ad loc.*). Fellows of the Royal College of Physicians and barristers are under the same disability in England. Up to 1858 all physicians were under this disability, but by 21 & 22 Vict. c. 90, a registered physician, who is not prohibited by the bye-laws of any college of physicians from suing for his fees, may recover such fees. The College of Physicians has made such a bye-law (*Gibbon* v. *Budd*, 2 H. & C. 92). A barrister cannot directly maintain an action for his fees,

and a promise to pay money for his advocacy is void (*Kennedy* v. *Broun*, 13 C. B. N. S. 677); but his rights are recognized to some extent. Thus he can prove in bankruptcy for fees due to him (*Re Hall*, 2 Jur. N. S. 1076).

## Tit. XXVII.

*Pr.* "In the case of quasi-contract, the person undertaking a duty either does not act voluntarily or acts voluntarily but without any intention of thereby creating a right *in personam* in favour of another" (Hunter, 279). The right arises by operation of law, not by agreement of the parties. Quasi-contracts are, therefore, not true contracts, and should not be identified with implied contracts, as has sometimes been done, for implied contracts are true contracts (Maine, ch. ix.). Probably the language of Lord Mansfield, C.J., in *Moses* v. *Macferlan*, 2 Burr. 1008, is not to be regarded as accurate: "If the defendant be under an obligation from the ties of natural justice to refund, the law implies a debt founded on the equity of the plaintiff's case, as it were upon a contract, *quasi ex contractu*, as the Roman law expresses it." This seems to identify implied contracts and quasi-contracts. See further, 2 Austin, Appendix, Fragment on Contract; Holland, 183.

1. There seems to be nothing corresponding to the *negotiorum gestor* in English law, except in the case of salvage. As a general rule, a person cannot create a right of action by a voluntary courtesy (see notes to *Lampleigh* v. *Brathwait*, 1 Smith, L. C.). Salvage is perhaps an exception to the general rule, owing to its falling under the Law Maritime, which professes to be

based to a large extent upon the civil law (Roscoe, Adm. Prac., Introd.). Salvage services may be rewarded, though there has been no antecedent request on the part of those on board the assisted vessel, provided that the vessel, lives, or cargo have been saved (*id.*, pt. i. ch. i.). Where the salvors have been summoned to the assistance of the distressed vessel, success is not a condition precedent to reward, as it is where they proceeded without a request, but the case then depends upon the principle illustrated in *Lampleigh* v. *Brathwait*, and the request is sufficient to found a claim upon, even though the salvage services have been unsuccessful (*ibid.*).

2. The relation of guardian and ward is in English law rather of the nature of a trust than of a quasi-contract, for the guardian is a trustee to the extent of the property which comes into his hands (Lewin, ch. xiii. 9).

3. The modes of division of property subject to co-ownership differ in English law according as the property is land or chattels; in Roman law there was no such difference. With respect to land, one co-owner is entitled, subject to the provisions of 31 & 32 Vict. c. 40, to have it divided between himself and the other owners, though they do not desire a partition. With respect to chattels, if part-owners of an ordinary chattel cannot agree who ought to have it, the only remedy (if any) appears to be by an action for a receiver and a sale (Lindley, bk. i. ch. i. s. 6).

5. The English executor is a trustee of the legacies for the legatees, as soon as he has assented thereto (Lewin, ch. xi. 16).

6. For money paid under mistake, see Tit. XIV. 1.

## Tit. XXVIII.

*Pr.* In English law a right or liability upon a contract may be acquired through another person. Examples are afforded by the relations of principal and agent, trustee and *cestui que trust*, husband and wife. In some cases the principal may sue or be sued upon a contract made by an agent. See Anson, App. B. Most of the cases will be found in *Irvine* v. *Watson*, 5 Q. B. D. 102, 414. Rights of action accruing to the trustee enure to the benefit of the *cestui que trust*. If the trustee of a covenant will not sue upon it, the *cestui que trust* may compel the trustee on a proper indemnity to lend his name to the *cestui que trust* to enable him to sue (Lewin, ch. xxviii.). Before the Married Women's Property Acts of 1870, 1874, and 1882, the husband had, as a general rule, a right to the benefit of all contracts entered into by his wife, who was regarded as his agent. Thus, in *Arnold* v. *Revoult*, 1 B. & B. 443, it was held that the husband might sue alone on covenants in a lease by husband and wife of lands which belonged to the wife before marriage. But now, by the Act of 1882 (45 & 46 Vict. c. 75, s. 1), a married woman is capable of holding property and of contracting as though she were a *feme sole*.

## Tit. XXIX.

*Pr. Solutio, novatio*, and *contraria voluntas*, as modes of extinguishing contracts, have their English counterparts; but *acceptilatio* and *stipulatio Aquiliana* are peculiar to Roman law.

As to *solutio*, in English law the contract is dis-

charged by performance or by something accepted as equivalent to performance. Thus, payment in a particular manner not provided for in the original agreement, or before the day when it falls due, may amount to satisfaction if the parties so agree. Upon this principle it was held, for instance, that acceptance of a cheque for £100 was a good satisfaction of a debt of £125 (*Goddard* v. *O'Brien*, 9 Q. B. D. 27). But payment of part is of itself no satisfaction of the whole, although the creditor agreed to receive the smaller sum in full discharge and gave a receipt accordingly (*Cumber* v. *Wane*, 1 Smith, L. C.).

If satisfaction is made by a stranger to the contract with the assent of the debtor, English law agrees with Roman in regarding the obligation as at an end. As to satisfaction by a stranger to the contract without the debtor's assent, the English law seems to be that acceptance of such a satisfaction is not a bar to a subsequent action upon the contract (Pollock, ch. viii.). This doctrine has, however, been doubted by high authority, as by Maule, J., in *Belshaw* v. *Bush*, 11 C. B. 191, and Willes, J., in *Cook* v. *Lister*, 13 C. B. N. S. 594, who says, "I apprehend that this is contrary to the maxim of the civil law, *debitorem ignarum seu etiam invitum solvendo liberare possumus.*" In order to take the case out of the Statute of Limitations, payment of rent must be made by the principal or his agent (*Chinnery* v. *Evans*, 11 H. L. C. 115). Lord Cranworth, in his judgment in that case, was of opinion that payment of rent for twenty years by a stranger would not be sufficient, as it would be merely a series of gifts. Where payment has been received for sixty years, a presumption will be made that it rested upon a legal foundation, and was not a gratuitous payment by a stranger (*Adnam* v. *Earl of Sandwich*, 2 Q. B. D. 485). In

*Walter* v. *James*, L. R. 6 Ex. 124, it was held that where payment is made by a third person for the debtor, but without his authority, it is competent for the creditor and the person who made the payment to rescind the transaction at any time before the debtor affirms it, and thereupon the payment is at end and the debtor becomes again liable. The law upon the point can hardly be regarded as settled. If the debtor ratify the payment by the stranger, it then becomes undoubtedly good as against the creditor. "If any stranger, in the name of the mortgagor or his heirs (without his knowledge or privity), tendereth money, and the mortgagor accepteth it, this is a good satisfaction" (Co. Litt., 206 b). An example of such a ratification occurs in *Simpson* v. *Eggington*, 10 Exch. 845.

In English law payment by the principal discharges the surety. So any binding agreement with the principal, founded on good consideration, whereby he is discharged, discharges the surety also (*Moss* v. *Hall*, 5 Exch. 49). If the surety pays, the principal is discharged, but the surety is entitled to be indemnified by him (Chitty, ch. iii. s. ii. 6).

2. A kind of parallel to the process by which the *stipulatio Aquiliana* became a universal form of discharge is afforded by the process by which the action of *assumpsit* grew to be the ordinary way of enforcing simple contracts (see Pollock, ch. iii.).

3. "Where a creditor assents at the debtor's request to accept another person as his debtor in the place of the first, this is called a novation" (Pollock, ch. v.). The question whether there is a novation or not frequently arises in the course of dealing between a customer and a firm upon a change in the firm, as in *Rolfe* v. *Flower*, L. R. 1 P. C. 27, and on the assignment of the business of a life assurance company with

reference to the assent of the policy-holders to the transfer of their policies, as in *Miller's Case*, 3 Ch. D. 391. The points upon which novation or not turns are: (1) whether the new firm or company assumed the liabilities of the old; (2) whether the creditor consented to accept the liability of the new debtors and discharge the old. The term "novation" seems to be used in English law only for the substitution of a new debtor, while *novatio* might be used for the substitution of a new creditor as well as of a new debtor (Sandars, *ad loc.*). As to the substitution of a new creditor in English law, it seems that since the Jud. Acts a new creditor may be substituted without the assent of the debtor. "Any one who enters into a contract with A must do so with the understanding that B may be the person with whom he may have to reckon" (Baggallay, L.J., in *Brice* v. *Bannister*, 3 Q. B. D. 581). In Roman law the assent of the debtor was necessary.

In Roman law, where the novation was by the substitution of a new contract, the new contract must be binding, but need not be of the same kind as the original contract, *e.g.* a *civilis obligatio* might be superseded by a *naturalis obligatio* (Sandars, *ad loc.*). In English law, when a new contract is substituted, it must be a binding one (*Noble* v. *Ward*, L. R. 2 Ex. 135; *Sanderson* v. *Graves*, L. R. 10 Ex. 234); nor need the new contract be of the same nature as the old one. Thus an action may be brought upon a parol contract at variance with and intended to supersede a contract under seal, though there has been no release under seal of the original contract (*Nash* v. *Armstrong*, 10 C. B. N. S. 259).

4. The rule of Roman law is very similar to the English rule, that a contract may be discharged in the same form as that in which it is made, a contract under seal by a contract under seal, and a parol contract by

a parol contract (Anson, pt. v. ch. i. s. 3). Of course in both Roman and English law a contract of higher solemnity could discharge one of lower solemnity, a *stipulatio* could discharge a consensual contract, and a release under seal a parol contract. Sometimes before breach a contract may be dissolved by a less solemn form (see note on par. 3). So a debt of record may be discharged by release under seal (*Barker* v. *St. Quentin*, 12 M. & W. 441). After breach, the right of action arising from the breach can only be discharged by release under seal, unless there is an agreement amounting to accord and satisfaction, or unless the liability has arisen upon a bill of exchange or promissory note (Anson, pt. v. ch. iii. s. 4).

# BOOK IV.

## Tit. I.

*Pr.* "Personal actions are founded either on *contracts* or on *torts*, a term used to signify such wrongs as are in their nature distinguishable from breaches of contract; and these torts are often considered as of three kinds, viz. *nonfeasance*, or the omission of some act which a man is by law bound to do; *misfeasance* being the improper performance of some lawful act; or *malfeasance* being the commission of some act which is in itself unlawful" (3 Stephen, bk. v. ch. vi.).

The signification of *delictum* was in one sense wider than that of tort. In English law *furtum* and robbery are regarded as crimes, not as torts. In another sense it was narrower, for *obligationes ex delicto* arose only from certain specified *delicta*, and it was not every wrongful act which would give rise to the *obligatio* (Sandars, Introd. s. 88). In English law two things must combine in order to constitute a tort, actual or legal damage (*damnum*) and a wrongful act (*injuria*). *Damnum sine injuria*, or *injuria sine damno*, will not, as a rule, be a ground of action (Addison, ch. i. s. 1). But where the necessary elements are both present, the maxim of English law is *ubi jus ibi remedium*. The law will never suffer a wrong and a damage without a remedy,

*Ashby* v. *White*, 1 Smith, L. C.). This rule is, however, subject to many real or apparent exceptions, such as *Seaman* v. *Netherclift*, 2 C. P. D. 53, where slanderous words spoken by a witness were held not to be actionable on the ground that the privilege of the speaker as a witness protected him. In Roman and English law alike evil intent alone will not constitute a *delictum* or tort (Sandars, *ad loc.*; *Stevenson* v. *Newnham*, 13 C. B. 285, where it was held that an act not amounting to legal injury cannot be actionable because done with a bad intent).

1. The definitions of theft or larceny in English books *e.g.* 2 East, P. C. 553, are mostly founded on Bracton's, itself founded upon Roman law as appearing in the text and in Dig. xlvii. 2, 1, 3. Bracton's words are: *Furtum est secundum leges contrectatio rei alienæ fraudulenta animo furandi invito illo domino cujus res illa fuerit* (150 b.). Bracton omits the *lucri faciendi gratia* of the Roman definition, because in English law the motive is immaterial, and the *usus ejus possessionisve*, because the definition includes an intent to deprive the owner of his property permanently (3 Stephen, Hist. C. L., ch. xxviii.). In Roscoe, Crim. Evid. *s.v.* "Larceny," the definition of larceny is "the wrongful taking of possession of the goods of another with intent to deprive the owner of his property in them." A fuller definition is that of Mr. Justice Stephen. "Theft is the act of dealing from any motive whatever, unlawfully and without claim of right, with anything capable of being stolen, in any of the ways in which theft can be committed, with the intention of permanently converting that thing to the use of any person other than the general or special owner thereof" (Stephen, C. L. s. 295).

*Furtum* differed from larceny in several other respects than those above mentioned. Besides the fundamental

difference that *furtum* was a tort, and the remedy by *actio* (though in the time of Ulpian criminal proceedings were often taken against the thief, *criminaliter agi*, Dig. xlvii. 22, 2, 92), the following may be noticed: (1) The division of *furtum* into *manifestum* and *nec manifestum* is unknown to modern English law, though Bracton adopts it (150 b). A similar distinction was of some importance as affecting the law of bail in Lord Mansfield's time, as may be seen from Junius, (letter lxviii.). A thief taken *flagrante delicto*, or "with the maner," as it was called, was held not to be bailable; it is now, however, held that the probable guilt or innocence of the accused is not so much to be regarded as the probability of his appearance at the time and place when and where he is to be tried (*Reg.* v. *Scaife*, 9 Dowl., 553). Perhaps an analogy to the Roman distinction is to be found in the old English law, that it was permissible to oust a disseisor by force, provided that the party disseised did so *flagrante disseisina* (3 Twiss' Bracton, xxxvi.). (2) It was *furtum* to use a *depositum* or *pignus* contrary to the owner's wishes (par. 6). This, perhaps, arose from a tendency in Roman law to extend the bounds of *furtum*, a tort; the tendency of English law, on the other hand, was to limit the bounds of larceny, a crime (1 Stephen, Hist. C. L., ch. ii.). (3) *Furtum* might be committed of things affixed to the freehold, as trees or growing fruit (Dig. xlvii. 2, 25, 2), or stones and sand (Dig. xlvii. 2, 57). By English common law things attached to the freehold are not subjects of larceny, but the severance of them is merely a trespass (4 Stephen, bk. vi. ch. v.). But many of such cases are now provided for by 24 & 25 Vict. c. 96. (4) There might be *furtum* of a slave or *filius-familias* (Dig. xlvii. 2, 14). In England a living person is not the subject of larceny, but may be the subject of

abduction, an offence which falls under a different statute (24 & 25 Vict. c. 100) from that which consolidates the law of larceny (24 & 25 Vict. c. 96). (5) The *obligatio ex delicto* arising from theft could be extinguished by agreement of the parties (Poste on Gaius, iii. 183); but in English law, though the bare taking again of a man's own goods which have been stolen (without favour to the thief) is no offence, still where a man either takes back the goods or receives other amends on condition of not prosecuting, this is a misdemeanor, punishable by fine or imprisonment (Hawk, P. C., bk. i. ch. 59, ss. 5, 7). This difference between Roman and English law results from the one regarding theft as a tort, the other as a crime. In English law, where an offence is of such a nature that it may be proceeded against either civilly or criminally (*e.g.* proceedings under the Trade-Marks Act), there is nothing illegal in compromise of the criminal proceedings (*Fisher* v. *Apollinaris Water Co.*, L. R. 10 Ch. 297).

4. In England a receiver of stolen goods, knowing them to have been stolen, may be jointly indicted with the thief, and, as a matter of practice, it is usual to combine with a count for larceny a count for receiving. This is allowed by 24 & 25 Vict. c. 96, s. 92.

5. The punishment for larceny is regulated by 24 & 25 Vict. c. 96. The maximum for simple larceny is ten years' penal servitude, but as much as fourteen years may be inflicted in certain special cases, as larceny by servants.

6. The English law is that as the taking, in order to constitute larceny, must be without the consent of the owner, so, as a general rule, no delivery of the goods from the owner to the offender upon trust can ground a larceny; as if A lends B a horse, and he rides away

with him. But it would be otherwise if B solicited the loan of the horse with intent to steal him (4 Stephen, bk. vi. ch. v.). A person in the lawful possession of goods may be liable civilly for conversion, though not guilty of theft, if he deal with them contrary to the orders of the owner. Thus, in *Syeds* v. *Hay*, 4 T. R. 260, where the captain of a vessel delivered goods against the owner's instructions to a wharfinger, under a mistaken impression that the wharfinger had a lien upon them, it was held that the owner might upon demand and refusal maintain trover against the captain, unless the latter could establish the wharfinger's right.

7. For *mens rea* see note on Bk. II. Tit. VI. 5.

10. In England a person obtaining possession of his own goods by a false pretence, with intent to defraud, was held guilty of larceny in *R.* v. *Wilkinson*, Russ. & R. 471. But this case stands almost, if not quite, alone (Roscoe, Crim. Evid., *s.v.* "Larceny"). Larceny by part-owners cannot in general be committed any more than larceny by owners, but in certain cases larceny by part-owners is made punishable by statute, 31 & 32 Vict. c. 116, s. 1.

11. *Actio furti* is a term adopted by Bracton (150 b), but does not correspond to anything now existing in English law, for in the case of larceny an action is the subsidiary rather than the principal remedy. "It has been said that the true principle of the common law is that there is neither a merger of the civil right, nor is it a strict condition precedent to such right that there shall have been a prosecution of the felon, but that there is a duty imposed upon the injured person not to resort to the prosecution of his private suit to the neglect and exclusion of the vindication of the public law. In my opinion this view is the correct one"

(Watkin Williams, J., in *Midland Insurance Co.* v. *Smith*, 6 Q. B. D. 568).

In English law there may be accessories, either before or after the fact, and aiders and abettors or principals in the second degree, in every case of larceny. An accessory is absent, a principal in the second degree present, at the time of the commission of the offence. By 24 & 25 Vict. c. 94, s. 1, an accessory before the fact may be indicted, tried, convicted, and punished as though he were a principal felon. Larceny is a felony both at common law and by statute.

By 24 & 25 Vict. c. 94, s. 2, a person who counsels, procures, or commands another to commit a felony, may be indicted either as an accessory before the fact or for a substantive felony, and punished as an accessory. The offence of soliciting and inciting to commit a felony is, where no such felony is actually committed, a misdemeanor only, and not a felony under the above statute (*Reg.* v. *Gregory*, L. R. 1 C. C. R. 77).

14. The property in an indictment for larceny may be laid either in him who has the special property, as a bailee, pawnee, carrier, or the like, or in the owner, and the indictment is good either way (2 East, P. C. 652).

15. English law partly agrees. Thus, goods stolen from a washerwoman, who takes in the clothes of other persons to wash, may be laid to be her property (*R.* v. *Facker*, 2 East. P. C., 653); but by the principle laid down in the note on the preceding paragraph, the owner would have a concurrent right to prosecute, while in Roman law he could not in such a case bring his *actio furti*.

17. Here, again, English law differs, as far as regards the property, which might be laid in the owner or in the depositary. And the owner may maintain an action

for conversion by a stranger, though the goods be in the hands of a carrier or other bailee (*Gordon* v. *Harper*, 7 T. R. 12).

18. See note on Bk. I. Tit. XXI.

19. See note on par. 11, and on Bk. II. Tit. VI. 3.

## Tit. II.

*Pr.* Robbery bears the same relation to larceny as *rapina* does to *furtum*. Bracton (150 b) uses *rapina* and robbery as synonymous terms. The maximum punishment for robbery is penal servitude for life (24 & 25 Vict. c. 96, s. 43).

1. *Animus furandi* is necessary to constitute the offence of robbery. Upon an indictment for robbery, Vaughan, B., said, "If the jury think that he took them" (the articles which the prisoner was charged with taking) "under a *bonâ fide* impression that he was only getting back the possession of his own property, there was no *animus furandi*, and the prosecution must fail" (*R.* v. *Hall*, 3 C. & P. 409).

*Invasio* is analogous to the forcible entry of English law. This offence is provided for by several old statutes, viz. 5 Ric. II. stat. 1. c. 8; 15 Ric. II. c. 2; 8 Hen. VI. c. 9; 21 Jac. I. c. 15. Compare with the text the cases of *Lows* v. *Telford*, 1 App. Cas. 414, where it was held that if a person having the legal title to land is in actual possession of it, the attempt to eject him by force brings the person who makes it within the provisions of 15 Ric. II. c. 2, even though such person may set up a claim to the possession of the land. Damages cannot be recovered against the rightful owner for forcible entry, as the statute only makes it an indictable

offence, and does not create any civil remedy for it (*Beddall* v. *Maitland*, 17 Ch. D. 174). There was at one time an action of forcible entry, which, for some time previous to the reign of Elizabeth, was the general mode of trying title (3 Reeves, 181); but in that reign it was practically superseded by the more convenient ejectment, 3 Reeves, 759.

## Tit. III.

*Pr.* By English law no action (except under special circumstances, as in Lord Campbell's Act) is maintainable for the death of a human being (*Osborn* v. *Gillett*, L. R. 8 Ex., 88). But many of the cases in the following paragraphs may be illustrated from English criminal law.

For the death of cattle, etc., an action is maintainable as in Roman law; but the rule as to damages is different. The English plaintiff could not recover more than the value of the animal at the time of its death, and not always that; for in an action against a railway company for loss of a horse, he is bound by his declaration of value (though under the truth) made on delivery of the horse to them (*McCance* v. *L. & N. W. Ry. Co.*, 7 H. & N. 477). And by 17 & 18 Vict. c. 31, s. 7, no greater damages than the sums there named are recoverable for the loss of horses, cattle, etc., unless at the time of delivery to the carrier they have been declared to be of higher value. Circumstances in mitigation of damages may be taken into consideration, *e.g.* in an action for shooting a dog the mischievous character of the animal (*Wells* v. *Head*, 4 C. & P. 568).

1. English law allows an action for causing the death of dogs (see above), of deer confined in a park, etc.,

though not for the death of such animals as are strictly *ferœ naturæ*, such as rooks (*Hannam* v. *Mockett*, 2 B. & C. 934).

2. By English law a man may repel force by force in defence of his property against one who manifestly intends by violence or surprise to commit robbery. If he kill the thief in so doing, it is justifiable self-defence; but a bare fear of the offence, unaccompanied with any overt act, will not warrant him in killing the thief by way of precaution, there being no actual danger at the time (1 East, P. C. 271).

3. By 24 & 25 Vict. c. 100, s. 7, "no punishment or forfeiture shall be incurred by any person who shall kill another by misfortune, or in his own defence, or in any other manner without felony."

4. Where persons shoot at butts, or any other lawful object, and a bystander is killed, there being no danger reasonably to be apprehended, the killing is only homicide by misadventure (1 Russell, bk. iii. ch. ii. s. 4). See the case of the death caused in play in Bracton, 136 b.

5. Death ensuing in the performance of an act otherwise lawful, may amount to manslaughter by the negligence of the party performing the act, as in the instance of workmen throwing down stones from the top of a house where there is a small probability of persons passing by (1 East, P. C. 262).

6, 7. Negligence or unskilfulness of a medical man is a ground for civil or criminal proceedings, or both. Whether the medical man be licensed or unlicensed, if he display gross ignorance, or criminal inattention, or culpable rashness in the treatment of a patient, he is criminally responsible (Roscoe, Crim. Evid., *s.v.* "Murder"). He does not undertake that he will perform a cure, nor to use the highest possible degree of

skill, but he undertakes to bring a fair and competent degree of skill (*Lanphier* v. *Phipos*, 8 C. & P. 479). If he does not do this, he is at least civilly liable.

8. The law seems to be the same in England (see *Hyman* v. *Nye*, 6 Q. B. D. 685). Where an action is brought for injury caused by the want of skill of a person in charge of a horse, it rests upon the plaintiff to show affirmatively a clear *primâ facie* case by evidence which will warrant an inference of negligence (*Manzoni* v. *Douglas*, 6 Q. B. D. 145). The locality must also be taken into consideration. It is the defendant's fault if he brings a wild horse into a place much frequented and unapt for breaking horses, if injury is caused by his so doing (*Mitchil* v. *Alestree*, 1 Vent. 295).

10. The law of the last sentence in the text would probably be good English law. If the plaintiff has sustained special damage (such as the deterioration of a team of horses by the loss of one), which is the natural and necessary result of the wrongful act of the defendant, such damages are recoverable if claimed in the plaintiff's statement of claim (Addison, ch. viii. s. 2).

11. In English law civil and criminal remedies are usually concurrent, not exclusive. Thus, an action under Lord Campbell's Act (9 & 10 Vict. c. 93, s. 1) is maintainable, although the death has been caused under such circumstances as amount to felony. In the case coming nearest to that in the text, that of a master bringing an action *per quod servitium amisit* to recover damages for an injury resulting in the instant death of his servant, it was held (so far differing from Roman law) that he could not recover damages, on the ground that at common law the death of a person cannot be a ground of action (*Osborn* v. *Gillett*, L. R. 8 Ex. 88). But in such a case the person causing the death of the servant might be indicted if the act amounted to a crime.

16. A close analogy to the relation between the *actio directa* and the *actio utilis* under the *lex Aquilia* is afforded by the actions of trespass and trespass on the case in England. To supply the deficiencies in the action of trespass, which must have been *vi et armis*, and must have produced direct and not consequential damage (*Holmes* v. *Mather*, L. R. 10 Ex. 261), a new writ of trespass on the case (so called from the words *in consimili casu* in the Statute of Westminster II. (1 Edw. I. c. 13, s. 24) was framed upon the analogy of the old writ of trespass, but applying to injuries not falling under the latter (Co. Litt., 73 b; 1 Spence, 240; Poste on Gaius, iii. 219).

## Tit. IV.

*Pr.* "By *injuria*," says Willes, C.J., in *Winsmore* v. *Greenbank*, Willes, 577, "is meant a tortious act; it need not be wilful and malicious, for though it be accidental, an action will lie." This seems wider than the use of the term in Roman law, in which an accidental act could scarcely be an *injuria*, though it might be a *damnum*. *Injuria sine damno* cannot found an action in English law (Tit. I. *Pr.*); but it might do so in Roman law, as in some of the cases mentioned in par. 1.

1. The assaults here mentioned would be actionable in English law. The slander would be actionable only if special damage, such as loss of trade, could be proved; unless the words imputed that the plaintiff had committed an indictable offence, or was afflicted with a contagious disorder, or were spoken of him in respect of his trade or business (Addison, ch. xvii. s. 2). But

the offender might probably be proceeded against criminally for a breach of the peace in the case in the text (*Cohen* v. *Huskisson*, 2 M. & W. 482). The wrongful *possessio bonorum* in the text may be illustrated by illegal distress, or by petitioning for an adjudication in bankruptcy without reasonable and probable cause (*Craig* v. *Hasell*, 4 Q. B. 492), both which are torts actionable by English law. As to *pudicitia attentata*, it was held in *Wellock* v. *Constantine*, 2 H. & C. 146, that where an assault upon a woman actually amounted to a rape, and the defendant had not been prosecuted, the plaintiff could not recover damages; but *qu.* whether this is now good law (see *Midland Insurance Co.* v. *Smith*, 6 Q. B. D. 561). Mere loss of chastity on the part of a woman gives her no ground of action against the person who deprived her of her chastity (*Saterthwaite* v. *Duerst*, 5 East, 47 (n)). The action for seduction is brought by the father or other person *in loco parentis*, not by the woman who has been seduced, and is founded upon the loss of service to the father, not the injury to the woman.

2. If an infant receives an injury, he may sue by his father as next friend (see Bk. I. Tit. XXI. *Pr.*). Formerly husband and wife joined in an action of tort for injury to the wife, but now by the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75, s. 1 (2)), she may sue by herself, and any damages recovered become part of her separate estate.

3. In English law a master cannot maintain an action *per quod servitium amisit* against a wrongdoer where there was a contract for safe carriage entered into between the servant and the wrongdoer (*Alton* v. *Midland Railway Co.*, 19 C. B N. S. 213). But where the action is against an independent wrongdoer, *e.g.* where the servant contracts with A, and a train of B

causes the injury, the master can maintain the action (*Berringer* v. *Great Eastern Railway Co.*, 4 C. P. D. 163). In both these cases the servant could have maintained an action in his own name, but the Roman slave could in no case bring the *actio injuriarum* (Dig. xlvii. 10, 15, 34).

4. An action *per quod servitium amisit* is no doubt maintainable in England by joint masters of a servant.

9. In actions of tort a greater latitude is allowed to a jury in the assessment of damages than in actions of contract. In all cases of malicious injuries and trespasses accompanied by personal insult or oppressive and cruel conduct, juries are told to give what are called exemplary damages, although the actual personal injury, measured by any pecuniary standard, may be but small (Addison, ch. xxii. s. 1).

10. So in English law either criminal or civil proceedings may be taken in the case of assault, defamation, etc. In some cases both civil and criminal proceedings may be taken, as in certain cases of obstructing highways, where an indictment is maintainable for the injury to the public and an action for any special injury suffered by a particular person beyond that suffered by him as one of the public. In other cases the criminal remedy, if pursued, bars the civil remedy, as in certain cases of assault (24 & 25 Vict. c. 100, s. 45, *Masper* v. *Brown*, 1 C. P. D. 97).

11. The well-known case of *Scott* v. *Shepherd*, 1 Smith L. C., is an illustration of this principle in English law. There it was held, that if a squib is thrown amongst a crowd in a public place, and is then tossed from one person to another, the first thrower, and all who have tossed the squib otherwise than in pure self-defence, are responsible for the injury it occasions.

12. Prosecutions for injuries may be instituted at any time on the principle *Nullum tempus occurrit regi* (2 Stephen, bk. iv. pt. i. ch. vi.). Actions are limited to various periods, according to the kind of injury (see 3 Stephen, bk. v. ch. ix.).

## Tit. V.

*Pr.* A person against whom the prætor or *judex* pronounced an unjust sentence suffered an *injuria* (Tit. IV. *Pr.*); but this is scarcely the case in English law. The *judex* partook of the nature of both a judge and a juror (Mackenzie, pt. v. ch. i.; see Tit. XVII.). In England, as a general rule, an action will not lie against a judge for any act done in his judicial capacity (*Kemp* v. *Neville*, 10 C. B. N. S. 523); but he may be liable where he acts without jurisdiction, owing to his mistaking the law (*Houlden* v. *Smith*, 14 Q. B. 852—a case which affords a good illustration of the doctrine hinted at in the text, *Ignorantia juris neminem excusat*). No proceedings, either civil or criminal, are maintainable against a juror in respect of his verdict, the only remedy for a corrupt verdict being a new trial (*Bushell's Case*, and notes thereto in Broom, Const. Law).

1. Compare, as to the penalty of ten *aurei*, the penalties imposed for various offences under the Highway Act (5 & 6 Will. IV. c. 50).

*Dupli actio.* There still remain in English law a few cases in which double damages may be recovered. By 2 W. & M. sess. 1, c. 5, s. 5, if a landlord distrains and sells where no rent is due, the plaintiff may recover double the value of the goods distrained. By 4 Geo. II. c. 28, s. 1, double value, and by 11 Geo. II. c. 19, s. 18,

double rent, of demised premises may in certain cases be recovered where the tenant holds over.

All the matters mentioned in the last sentence may be taken into consideration by an English jury. Thus it was held in *Phillips* v. *London and South Western Railway Co.* (5 C. P. D. 280), that in an action for personal injury to a passenger, the jury in assessing the damages may take into their consideration, besides the pain and suffering of the plaintiff, and the expense incurred by him for medical and other necessary attendance, the loss he has sustained through his inability to continue a lucrative professional practice.

3. The liabilities of the master of the ship and the innkeeper differ in English and Roman law. In English law, the master of a ship appears not to be liable for loss through theft, unless (1) he be a common carrier, which the master of a general ship *primâ facie* is (*Laveroni* v. *Drury*, 8 Exch. 170); or (2) he have received the goods to keep safely (see note to Bk. III. Tit. XIV. 3). By 17 & 18 Vict. c. 104, s. 503, the owner (who may be the master) of a ship is not liable for loss by robbery, embezzlement, etc., of certain valuable articles therein mentioned, unless the owner or shipper has inserted them in the bill of lading or given notice of the nature and value of them to the owner or master. The innkeeper is liable at common law, on the custom of the realm, for the loss of his guest's goods (*Calye's Case*, 1 S. L. C.). But the goods must be received by him in his character of innkeeper, for if he receive them in some other character, he is liable only according to the nature of the particular bailment (*Williams* v. *Gessy*, 5 Scott, 56). The common law liability of an innkeeper has been much diminished by 26 & 27 Vict. c. 41, by which an innkeeper is not liable to make good any loss of goods or property (with

certain exceptions) beyond the value of £30, except (1) where such goods or property shall have been stolen, etc., through the wilful act, default, or neglect of such innkeeper or any servant in his employ; (2) where such goods or property shall have been deposited expressly for safe custody with such innkeeper, provided that he keeps a copy of the first section of the Act exhibited in a conspicuous part of his hall or entrance. The omission of the word "act" in the copy of the first section hung up in the innkeeper's hall was held to disentitle him to the protection of the Act (*Spice* v. *Bacon*, 2 Ex. D. 463).

In English law a livery-stable keeper does not insure, and seems to be responsible only for the ordinary negligence of himself or his servants. The rule is apparently the same in the case of an agister (Story, s. 443).

## Tit. VI.

*Pr.* "Actions . . . are defined by the Mirrour to be 'the lawful demand of one's right,' or as Bracton and Fleta express it, in the words of Justinian, *jus prosequendi in judicio quod alicui debetur*" (3 Stephen, bk. v. ch. vi.).

1. "Actions at law are subject, in the first place, to this principal division, that they are either personal, real, or mixed" (*ibid.*). This phraseology, says the note, is drawn from the civil law. The identification, however, of an *actio in rem* and a real action would be very dangerous, though it may be that the English name was suggested by the Roman one. Real actions concerned real property only, and were those in which the

demandant claimed the specific recovery of lands (*ibid.*); but the *actio in rem* concerned movables and immovables alike. Real actions were, with the exception of dower, writ of dower, and *quare impedit*, abolished by 3 & 4 Will. IV. c. 27, s. 36. The only real action of any practical importance at present is *quare impedit*, which is occasionally brought when the object is to recover the presentation to a benefice. It is not affected by the Jud. Acts, as one of the forms of indorsement on a writ given in Jud. Act, 1875, App. A., pt. ii., runs, "The plaintiff's claim is in *quare impedit* for ——." It is worthy of notice that Bracton (102 a) uses *actio in rem* as applicable to an action for the recovery of either a movable or immovable, but says at the same time that an *actio in rem* for a movable is practically an *actio in personam*.

The term "action *in rem*" is sometimes used in English law to express an action by which the recovery of a specific thing is sought; it would include real actions, and perhaps the actions of detinue and replevin (see Güterbock, ch. xix. note). There is a technical use of the expression in Admiralty law. The action *in rem*, so called, is peculiar to the Admiralty Division of the High Court of Justice, and most actions in that court are of that nature, the actions *in personam* being rare. In an action *in rem* the property in relation to which the claim has arisen, or the proceeds thereof when in court, are proceeded against, and are available to satisfy the claim if established (Roscoe, Adm. Prac., pt. ii. Ord. i. note). The successful plaintiff in an action *in rem*, if successful, obtains a judgment *in rem*, which is binding upon all the world, not merely *inter partes*, until set aside in due course. See the notes to the *Duchess of Kingston's Case*, 2 Smith, L. C.

The *actio in personam* nearly corresponds to the per-

sonal action of English law. "Personal actions are those whereby a man claims the specific recovery of a debt or of a personal chattel, or else satisfaction in damages for some injury done to his person or property" (3 Stephen, bk. v. ch. vi). The only difference is that, as has been said above, detinue and replevin would in Roman law probably be regarded as *actiones in rem.*

The terms real, personal, and mixed are also used as the divisions of *statutes* in international law (see 4 Phillimore, ch. xvi.).

3. Compare the distinction existing before the Judicature Acts between actions at law and suits in equity, a distinction now abolished (Jud. Act. 1875, Ord. i. r. 1). See note on Bk. I. Tit. II. 7.

The fictions of English law were no doubt introduced for the same purpose as those of Roman law, viz. to modify the operation of a rule of law, the letter of the law remaining unchanged. They applied, as in Roman law, both to substance and procedure. But the English fictions are difficult to compare with the Roman, as the former were generally invented to meet circumstances unknown to the latter. On the other hand, the purposes for which Roman fictions were used were often those for which in England fictions were unnecessary. The rule as to fictions laid down by Lord Mansfield is probably applicable to Roman law; "a fiction of law shall not be contradicted so as to defeat the end for which it was invented, but for every other purpose it may be contradicted" (*Mostyn* v. *Fabrigas*, 1 Smith, L. C.). See for the fictions of English law, Maine, ch. ii.; Poste on Gaius, iv. 30; Best on Evidence, s. 309. Besides the fictions mentioned by Sir H. Maine may be noticed the following: the *ac etiam* clause, by which the Queen's Bench preserved jurisdiction over matters of debt, the allegation being that a violent trespass had been com-

mitted, *ac etiam*—then the real cause of action was stated (Best, s. 313); the "sham plea" of the old pleading, for an example see *Richley* v. *Proone*, 1 B. & C. 286; fines and recoveries (Williams, R. P., pt. i. ch. ii.); the action of ejectment (1 Spence, 233); the false allegation, in order to bring a case within the jurisdiction of the Admiralty, that a contract had been made at sea (Williams and Bruce, Introd.). All these are now obsolete, but there are fictions still in existence, though the subject is not as important now as it was half a century ago, and the tendency of modern decisions is to minimise their effect as far as possible. Examples of fictions still existing are that of a lost grant as a ground of right (*Dalton* v. *Angus*, 6 App. Cas. 740), and that of the coercion of the husband when husband and wife commit a felony together (Roscoe, Crim. Evid., Tit. "Coercion by Husband."

It may be noticed that in Roman law the fiction was usually the introduction of the prætor, in English law of the common law judge. "Legal" fiction probably means a fiction of law in the strict sense of the term, as opposed to equity, a fiction by which the common law judge made a hesitating step in the direction of equity, but which was retained in some cases when it had become useless and absurd.

4. No such fiction exists in English law, in which, as a general rule, purchase passes property (see Bk. III. Tit. XXIII.).

With the feigned *usucapio* compare (as to its effect, not as to its origin) the feigned lost grant mentioned in par. 3.

5. For *postliminium* see Bk. II. Tit. VI. A similar provision to that in the text is found in 37 & 38 Vict. c. 57, by which a person under certain disabilities, as infancy, coverture, or unsoundness of mind, is allowed

to bring an action within six years after the disability ceased, although more than twelve years have expired since adverse possession began.

6. For the Roman law of bankruptcy see Bk. III. Tit. XII. By 13 Eliz. c. 5, every feoffment, gift, grant, etc., of lands and tenements, goods and chattels, etc., made to delay, hinder, or defraud creditors, is void as against them. By the Bankruptcy Act, 1869, 32 & 33 Vict. c. 71, s. 6, a fraudulent conveyance, gift, delivery, or transfer of the debtor's property or of any part thereof is an act of bankruptcy. See on these statutes *Twyne's Case*, 1 Smith, L. C.

7. In modern English law the goods of a farmer may be distrained, and the distress sold under 2 W. & M., sess. 1, c. 5, s. 2, without the intervention of the Court. But originally the remedy by distress seems to have been judicial, not, as at present, extra-judicial (Bigelow, p. 202; Maine, Early History of Institutions, ch. ix.). So far as the sanction of a Court was necessary, the old system bore some analogy to the *actio Serviana.*

The *actio quasi-Serviana* may be compared with an action by a mortgagee in the Chancery Division to compel sale or foreclosure.

This paragraph is cited in the judgment in *Ryall* v. *Rowles*, 2 White & Tudor, L. C., where Burnet, J., said that *pignus* might be valid without delivery, and that the distinction between *hypotheca* and *pignus* is that the former is of immovables, the latter of immovables capable of delivery. But the true distinction seems to be that "when the thing over which the right was given passed into the possession of the creditor, the right of the creditor was expressed by the word *pignus;* when the thing remained in the hands of the debtor, the right of the creditor was expressed by *hypotheca*" (Sandars on Bk. II. Tit. V.).

9. In England, an action for money lent may be brought in the same manner, whether the contract is verbal or not. It is only the evidence, not the form of the action, which would be different.

11. No doubt in early English law the question might be tried *per testes*, whether the defendant had duly waged his law in a previous action (Bigelow, p. 309). For the wager of law see note to Bk. II. Tit. XXIII. 12.

13. "The object of a *præjudicialis actio* was to ascertain a fact, the establishing of which was a necessary preliminary to further judicial proceedings" (Sandars, *ad loc.*). So by the Jud. Act. 1875, Ord. xxxiv. r. 2, preliminary questions of law, and by Ord. xxxvi. r. 6, preliminary questions of fact, may be separately tried. By analogy to the rule in Ord. xxxiv. r. 2, the Court will at the trial try first a question of law, if its decision may dispense with the trial of questions of fact (*Pooley* v. *Driver*, 5 Ch. D. 458).

16. For the mixed action of English law see note to par. 1. Mixed actions were abolished at the same time as real actions (3 & 4 Will. IV. c. 36), where the term "mixed action" has statutory authority. The action of ejectment, a mixed action at the time of that Act (see 3 Stephen, bk. v. ch. vi.), was specially excepted by the Act; but after being entirely remodelled by the Common Law Procedure Act, 1852, has been finally superseded by the Jud. Acts. See Wilson, Jud. Acts, note to Ord. ii. r. 3.

18. The Roman penal action differed in several respects from the English action for a penalty. (1) The Roman action, as the *actio furti*, was rather an action of tort than an action of debt, which is usually its form in English law (Roscoe, N. P. Evid., *s.v.* "Action for Penalty"). (2) The English action is invariably upon a

statute. (3) The English action may in some cases, *e.g. Dyer* v. *Best*, L. R. 1 Ex. 152, be brought by a common informer as well as by a party aggrieved. The common informer seems unknown to Roman law. (4) An action on a penal statute in England dies with the defendant (see note on Tit. XIII. 1).

An action against the thief lies in English law, subject to the limitation mentioned in the note to Tit. I. 11.

19. An action for a legacy or to enforce a charitable trust would, in English law, have nothing of the nature of an action for a penalty, the defendant would merely be liable for the principal sum and interest (2 Williams, Ex., pt. iii. bk. iii. ch. iv. s. 7; Lewin, ch. xiv. s. 5).

20. *Mixtæ sunt actiones in quibus uterque actor est* (Dig. xliv. 7, 37, 1). So in English law there may be a claim by the plaintiff and a counter-claim by the defendant, who "is thus enabled to have his claim tried and disposed of concurrently with that of the plaintiff, so that the latter shall gain no advantage in point of time, but justice shall at one and the same time be done between the parties" (Cockburn, C.J., in *Stooke* v. *Taylor*, 5 Q. B. D. 574). Of course it is only as far as there is more than one *actor* that the claim and counter-claim have any analogy to the *actio mixta*. In the action of replevin, both parties are actors (*Curtis* v. *Wheeler*, M. & N. 493).

22. So in an English action for the detention of goods the claim may be for the goods or their value. The damages are in general nominal if the goods are given up. Before the Common Law Procedure Act, 1854, if the defendant chose to pay the sum assessed as the value of the goods, the goods themselves could not be recovered. But now, by s. 78 of that Act and by Jud. Act, 1875, Ord. xlix., a writ of delivery of the

specific goods may be had by the plaintiff. See Jud. Act. 1875, App. F. 8, for a form of such a writ. So in an action for specific performance, the successful plaintiff may have a writ of assistance from the Court, without any alternative as to damages (2 Dart. ch. xviii. s. 10).

23. See note to Tit. V. 1.

24. By 2 W. & M., sess. 1, c. 5, s. 4, treble damages are recoverable for rescous or pound-breach. This seems to be the only remaining example of such damages in English law.

25. There seems to be no case in England in which fourfold damages are recoverable.

27. The *actio quod metus causa* would correspond to some extent to an English action to set aside a contract or conveyance entered into under duress, as to which see *Williams* v. *Bayley*, L. R. 1 H. L. 200. But in such an action the quadruple value is not claimed as in the Roman action.

28. According to Mr. Spence, the Roman distinction between *actiones stricti juris* and *actiones bonæ fidei* has been imported into English law, in which they would be represented by legal and equitable (including *assumpsit*) actions respectively (1 Spence, 218, 246). But as long as there was any meaning in this distinction these actions fell under the cognisance of different courts, except in the case of *assumpsit*, and except so far as equitable pleas were allowed in common law actions by 17 & 18 Vict. c. 125, s. 83. Again, in equitable just as much as in legal actions defences were pleaded; while in Roman law an *exceptio* was only necessary in actions *stricti juris*, for the action *bonæ fidei* implied any *exceptio* that could be set up (Dig. xxxv. 1, 84, 5). See note to Tit. XIII. Since the Jud. Acts, the High Court of Justice and the Court of Appeal have full power to grant relief in respect of

any legal or equitable claim, so that as far as possible all matters in controversy between the parties may be completely and finally determined, and all multiplicity of legal proceedings concerning any of such matters avoided (Jud. Act, 1873, s. 24 (7)). Thus all actions tend to be in the Roman sense actions *bonæ fidei*. But certain special defences must still be specially pleaded, *e.g.* the Statute of Limitations, Jud. Act, 1875, Ord. xix. r. 18.

If the contract was nameless, the action was *præscriptis verbis* (Poste on Gaius, iv. 40). So in the English pleading before the Jud. Acts there was a distinction between special and common counts, the latter being in a fixed form, the former setting forth with more or less of particularity the facts of the case. The two kinds of counts were often combined, thus an action upon a special contract might be followed by one or more of the common or *indebitatus* counts (so called because the plea to them was *Never indebted*), viz. the counts for goods sold and delivered, goods bargained and sold, work done and materials provided, money lent, money paid, money received, interest, and upon accounts stated (Bullen, 35). It must be remembered that the distinction between special and common counts applied only to common law actions, while the *actio præscriptis verbis* was *bonæ fidei*, *i.e.* rather an equitable than a legal action.

29. For *dos* see Bk. II. Tit. VIII. By English law the wife has no priority over other incumbrancers upon the husband's estate, but her rights are generally secured, as far as regards any allowance by her husband, by settlement. The settlement is liable to be declared void as against creditors if it tend to delay them under 13 Eliz. c. 5, or if, in the case of a trader, it does not fulfil the conditions necessary by 32 & 33 Vict. c. 71,

s. 91. In one case the wife is actually postponed to instead of preferred to other creditors, that is, where she has lent money to her husband (45 & 46 Vict. c. 75, s. 3).

30. See note on par. 28. *Compensatio* bears a strong analogy to the English set-off, as it has existed since the Jud. Acts. By Jud. Act, 1875, Ord. xix. r. 3, "A defendant in an action may set-off, or set up, by way of counter-claim against the claim of the plaintiff, any right or claim, whether such set-off or counter-claim sound in damages or not; and such set-off or counter-claim shall have the same effect as a statement of claim in a cross action, so as to enable the Court to pronounce a final judgment in the same action, both on the original and on the cross claim." For the difference between set-off and counter-claim see *Stooke* v. *Taylor*, 5 Q. B. D. 569. The difference is an important one as far as regards the costs of the parties, though judgment may in both cases be given only for the balance (Ord. xxii. r. 10). Since the Jud. Acts, the debts of the plaintiff and defendant need not be of the same nature or arise from the same transaction; this was also the case in Roman law (Sandars on par. 39). The following differences may be noticed in Roman and English law. (1) In one case the legislature has interfered with the right of set-off from motives of public policy. By the Truck Act (1 & 2 Will. IV. c. 37, s. 5), in an action for wages by a workman in certain trades, a plea of set-off for goods supplied by the employer cannot be pleaded. This is apparently not altered by the powers given to the County Court under 38 & 39 Vict. c. 90, s. 3. (2) The rule, as laid down in *George* v. *Clagett*, 7 T. R. 359, viz. that where a factor sells goods without disclosing the name of his principal, the purchaser, being ignorant of the fact, may in an action by the principal

set-off a debt due to himself from the factor, was probably unknown to Roman law. (3) By the Bankruptcy Act, 1869 (32 & 33 Vict. c. 71, s. 39), the benefit of a set-off against the property of a bankrupt may be claimed by any one giving credit to the bankrupt without having, at the time of giving credit, notice of any act of bankruptcy. This rule, like the rule in *George* v. *Clagett*, has no doubt arisen from the necessities of modern commerce. (4) Probably in what would correspond to an *actio depositi* in England, set-off would be allowed since the Jud. Acts. (5) In Roman law *compensatio* might be of a debt due by *naturalis obligatio* (see notes to Bk. III. Tit. XIII. 1; Bk. IV. Tit. XIII., *Pr.*); in English law, although the set-off is extended by Jud. Act, 1875, Ord. xix. r. 3, the set-off must be of a debt for which an action could be brought (*Rawley* v. *Rawley*, 1 Q. B. D. 461). The reason of this is that *compensatio* was *juris gentium*, while set-off is the creature of statute (Pollock, ch. xii.).

31. "In the *actiones arbitrariæ*, the judge was instructed only to condemn the defendant in a sum of money, if he did not satisfy the demand of the plaintiff, supposing that demand was well founded" (Sandars, *ad loc.*). Compare the English action of detinue, note to par. 22.

32. In England, though the claim be for damages generally, which may be made where the damages are unliquidated, the jury must find for a certain sum; and they must not exceed the damages laid in the statement of claim; if they do, the mistake must be rectified by *remittitur* of the excess, or by amendment of the statement of claim (1 Archbold, 406).

33. If an English plaintiff claim more than is due (which can only be where the damages are liquidated), the mistake would be cured by amendment of the state-

ment of claim by Jud. Act, 1875, Ord. xxvii. The only penalty to which the plaintiff would be subject, would be any additional costs thereby occasioned. If the action be brought prematurely, the effect would be a nonsuit or judgment for the defendant, but no such penalty as was imposed by Roman law. Very probably the plaintiff would be nonsuited with leave to sue when the action was ripe. See Jud. Act, 1875, Ord. xli. 6. Or, seeing his error, he might discontinue the action before trial (Ord. xxiii.).

34. Such a mistake would in England no doubt be cured by amendment. See the last note.

35. Amendment would here again be the remedy.

36. Examples of the same principle are found in English law in the case of an action against the executors for the debt of a testator, in which their liability is limited to the amount of assets which have come to their hands (William, P. P., pt. iv. ch. iii.); and in the case of an action against a husband for the ante-nuptial debts of his wife, for which he is liable to the extent only of all property which he may have acquired or become entitled to from or through his wife (45 & 46 Vict. c. 75, s. 14).

37. Such questions in England may be tried in a summary way under the powers of 45 & 46 Vict. c. 75, s. 17. But that section is merely enabling, so that questions between husband and wife may still be tried by action. In such a case, the *beneficium competentiæ*, or the privilege of being condemned only in such an amount as he could pay without being reduced to destitution (see Sandars, *ad loc.*), is not extended to the English as it was to the Roman husband.

38. The rule would be different in these cases in England. As in the last paragraph, the *beneficium competentiæ* would not apply.

As to an action for a gift, if it is required that a gift should be perfected by delivery in English law, there could of course be no action for it; but if a parol declaration of trust in favour of a volunteer is enforceable in equity, in that case an action would lie against the donor (*Jones* v. *Lock*, L. R. 1 Ch. 25; note to Bk. II. Tit. I. 40).

40. For bankruptcy see note to Bk. III. Tit. XII. Roman and English law differed as to the continuing liability of the bankrupt. By Roman law the after-acquired property of an insolvent remained liable to successive sales until satisfaction of the debt (subject to the privilege in the text), except in the case of a slave instituted *heres necessarius* (Poste on Gaius, iii. 77). By English law a bankrupt, on the conditions necessary by 32 & 33 Vict. c. 71, s. 48 being fulfilled, is entitled to his discharge, and by that discharge is released from all liabilities, except those incurred by fraud or breach of trust, or those whereof he has obtained forbearance by fraud, and except debts due to the crown and debts for revenue offences (*id.*, s. 49).

It may be noticed here, in addition to the differences mentioned in the note to Bk. III. Tit. XII., that a *venditio bonorum* might take place after the death of the debtor. In England a man cannot be adjudged bankrupt after his death, but administration of the goods of a deceased debtor may be granted to a creditor.

## Tit. VII.

*Pr.* As the peculiar legal relations of slave and *filius-familias* are foreign to English law, the law of this paragraph has its counterpart in English law only in

a modified degree in the relation of servant and child to a third party with whom a contract is made.

1. In English law a master is liable *civiliter* for the acts and contracts of his servant within the scope of his employment. But in order to render the master responsible, his assent must in all cases appear, either by express evidence or by proof of facts from which the law will raise an inference that such assent was given (Chitty, ch. ii. s. ii. 1). No doubt Roman law would agree with English in this, that the authority of the master must be strictly pursued in order to bind him, *e.g.* a domestic servant who has never been employed in any other capacity cannot bind his master by purchasing goods unconnected with domestic use (*ibid.*).

2. English law as to the powers of the master of a ship is derived from the Roman law upon the same subject (4 Phillimore, ch. xli.); but owing to the development of commerce, questions have arisen which could scarcely have been known to Roman law, chiefly in the direction of international law. And in two cases English law seems to have fixed the owners with less liability than that to which they were exposed by Dig. xiv. 1, 1, 5, *Omnia facta magistri debet præstare qui eum præposuit, alioquin contrahentes decipientur.* (1) The master has no authority to sell the ship, except in cases of absolute necessity (*The Glasgow*, Swab. 146). (2) He may raise money for absolutely necessary repairs, but only where both he and the ship are in a foreign port, and the flag of the ship is notice to all the world that his implied authority is limited by the law of the flag (*Lloyd* v. *Guibert*, L. R. 1 Q. B. 115). Again, by Roman law the owners were liable *in solidum* for the obligations of the master, whether *ex contractu* or *ex delicto* (Dig. xiv. 1, 1, 20). In England there is a statutory limitation of liability, where loss of life or damage has been caused

without the actual fault or privity of the owners; in respect of loss of life to an amount not exceeding £15 per ton of the ship's tonnage, and in other cases to an amount not exceeding £8 (25 & 26 Vict. c. 63, s. 54). Another difference may be noticed. By English law a master may be part-owner (see for an example *The Jenny Lind*, L. R. 3 A. & E. 529). This could not have been the case in Roman law, where a slave was *magister*, though no doubt a free *magister* might have been part-owner. The *actio exercitoria* was brought in the same Court, whatever the circumstances or amount of the claim might be. In England, a claim for necessaries not within the provisions of 3 & 4 Vict. c. 65, s. 6, and 24 Vict. c. 10, would ordinarily be brought in the Queen's Bench Division; a claim for necessaries within those enactments or upon a bottomry bond, in the Admiralty Division, and a claim for necessaries under £150, in a County Court having Admiralty jurisdiction (31 & 32 Vict. c. 71, s. 3).

As to the *actio institoria*, English law agrees with Roman as to the liability of the master. See above.

6. The English law, with regard to the liability of a parent for the contracts of his child, practically depends, as in the case of servants, upon the authority given. Where a parent gives no authority and enters into no contract, he is no more liable to pay a debt contracted by his child, even for necessaries, than a mere stranger would be (Chitty, ch. ii. s. i. 4).

7. This provision is stricter than the English law, by which money lent to a person under age for necessaries may be recovered. Such a case is specially excepted by the Infants' Relief Act, 1874 (37 & 38 Vict. c. 62). As no action was allowed by Roman law against the *filiusfamilias* when become *sui juris*, so, by 37 & 38 Vict. c. 62, the infant cannot ratify on coming of age

any contract entered into while under age, except such contracts as he might make while under age. See further on this subject note to Bk. I. Tit. XXI. English law goes farther than Roman in granting relief in the case of bargains made with expectant heirs, even though they have passed the age of infancy, as in *Earl of Aylesford* v. *Morris*, L. R. 8 Ch. 484. In *Earl of Chesterfield* v. *Jannsen*, 1 White & Tudor, L. C., the leading case on the subject, Lord Hardwicke refers to the *Senatusconsultum Macedonianum*.

8. In Rome a slave or *filiusfamilias* was, no doubt, known to be such, and contracted as such, so that the English law relating to actions against an agent supposed to be a principal or acting on behalf of an undisclosed principal would not apply. Where in England the agent is known to be an agent and acts for a principal named, the contract is made with the principal, and he is the proper person to be sued, as in Roman law. The doctrine rests upon this ground, that the act of the agent was the act of the principal, and the subscription of the agent was the subscription of the principal (Parke, B., in *Beckham* v. *Drake*, 9 M. & W. 96). See notes to *Thomson* v. *Davenport*, 2 Smith, L. C. This doctrine would equally apply to children and servants. See note to Tit X. 1.

## Tit. VIII.

*Pr. Noxæ deditio* in the case of a *filiusfamilias* or slave was probably only a logical sequence from such *deditio* in the case of animals and inanimate objects, for which see note to the next Title. At a later stage of law, an alternative course of action was allowed to the

master of the slave in fault, either to give up the slave or pay for the damage. At a later stage, again, represented by modern English law, the master cannot rid himself by *deditio* of his liability to an action for the default of his servant. As far as regards the liability of the master by *noxalis actio*, English law seems to differ from Roman in two points. (1) The servant is equally liable with the master in respect of his own personal participation in a wrongful act (Addison, ch. xx. s. 2). (2) In order to charge the master with liability, the wrongful act must have been committed within the scope of the master's employment, or have been ratified by him. See *Rayner* v. *Mitchell*, 2 Q. B. D. 357, for a recent example. If the act be committed within the scope of the servant's employment, it is no defence that the master was ignorant of it, and that it was contrary to his general orders (*Reg.* v. *Stephens*, L. R. 1 Q. B. 702, *cf.* Cod. iii. 41, 2). Roman law probably extended the liability to all wrongful acts, for any act done by a slave must necessarily have been done within the scope of his employment, as the slave had no distinct *persona* (Sandars on Bk. I. Tit. III.). This wider liability of Roman law was compensated by the privilege of *deditio*.

6. Of course in English law an obligation can arise between master and servant, and one could bring an action against the other for a wrongful act. If there be personal negligence on the part of the master, an action lies (*Ashworth* v. *Stanwix*, 30 L. J. Q. B. 183). But the master is not in general liable for any injury sustained by the servant while employed in his master's business, whether through his fellow-servant or otherwise (*Priestley* v. *Fowler*, 3 M. & W. 6); for every workman who engages in a dangerous employment takes it with all its ordinary risks (Addison, ch. iv. s. 1). To

this there are certain exceptions—(1) the case of hidden and secret dangers (*ibid.*); (2) cases falling under the provisions of the Employers' Liability Act, 1880, 43 & 44 Vict. c. 42).

7. In some cases an action may be brought against an infant in English law for torts committed by him (see Bk. I. Tit. XXI., *Pr.*) If a child, whether infant or not, be in the position of a servant or agent, the parent is liable for his torts in the same way as he would be for those of any other servant or agent; but in general a parent is not liable for the torts of his child where such child is not a servant or agent. There is, however, a kind of indirect liability in the case of an act for which a juvenile offender has been committed to a reformatory or industrial school, when the parent may be ordered to contribute to the support of his child while in such reformatory or industrial school (29 & 30 Vict. c. 117, s. 25; c. 118, s. 39). The liability of the *paterfamilias* for the torts of the *filiusfamilias* may be compared with the liability of the English husband for the torts of his wife, which apparently still exists by the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75, s. 1 (2), if the injured party choose to join him as a defendant. It is remarkable that the same principle does not appear in the Roman system, in which the wife was originally regarded as the daughter of her husband (Maine, ch. v.).

## Tit. IX.

*Pr. Noxæ deditio* in the case of animals bears a striking similarity to the obsolete deodand of English law. "Whatever personal chattel was the immediate and

accidental occasion of the death of any reasonable creature was called a deodand, and became forfeited to the Crown" (2 Stephen, bk. iv. pt. i., ch. vii.). Living creatures, such as horses or cattle, might be deodands (Bac. Abr., Vin. Abr., Deodand). Deodands were abolished by 9 & 10 Vict. c. 62. The law of deodand differed from the law of *noxæ deditio* in these among other respects. (1) *Noxæ deditio* was only an alternative. The master or owner might, if he chose, defend a *noxalis actio* in preference to giving up the slave or animal. (2) *Noxæ deditio* only applied to living beings, though possibly there are traces in Roman law of the original application of the principle to inanimate things. The Roman and English laws seem to approach the most nearly in the importance attached by English law to the question whether or not the chattel which caused the death was in motion (Holmes, lect. i.). (3) The right to the *noxa* or forfeited chattel was different; Roman law gave it to the injured person, English law to the crown. (4) A deodand was only due in case of death; the liability discharged by *noxæ deditio* attached in case of injury not resulting in death. See further on the law of deodand, besides the authorities cited, Bracton, 122 a; 1 Hale, P. C. 419; 3 Stephen, Hist. C. L., ch. xxvi.

Distress damage feasant presents an analogy to *noxæ deditio* to this extent, that in both cases a remedy is provided by acts of the parties themselves rather than by act of the law; but in the one case it is the injured person, in the other, the owner of the thing which committed the injury, who makes use of the remedy. A distress damage feasant may be made of any cattle or other things animate or inanimate which are wrongfully upon a man's land or in his house, incumbering it or otherwise doing damage. Such a distress further

differs from *noxæ deditio*, in that it can only be of things actually in the act of doing damage, and that the distress taken is only a pledge, and cannot be sold. See note to Woodfall, ch. xi. s. 10.

The English law as to liability to the *noxalis actio* is somewhat different. In the case of injury to persons or other animals by animals *mansuetæ* or *domitæ naturæ*, it is necessary, in order to charge the owner, for the plaintiff to prove the *scienter*, *i.e.* to show that the owner knew of the savage disposition of the animal (*Worth* v. *Gilling*, L. R. 2 C. P. 1). In such a case he is bound to keep it secure at his peril (*May* v. *Burdett*, 9 Q. B. 112). But the mere keeping of an animal of a fierce nature, as a tiger, bear, or dog known to bite, is in itself unlawful (*ibid.*). Where the injury is to property properly fenced, the law seems to be the same as in the last case, *i.e.* that no *scienter* or negligence need be proved even in the case of animals *mansuetæ naturæ*. "The owner must keep them in at his peril, or he will be answerable for the consequences of their escape; that is, with regard to tame beasts, for the grass they eat and trample upon, though not for any injury to the person of others" (Lord Blackburn in *Fletcher* v. *Rylands*, L. R. 1 Ex. 280). Where the injury is to property adjoining the highway and not fenced from it, the owner is not liable for trespass of cattle without proof of negligence (*Tillett* v. *Ward*, 10 Q. B. D. 19). In one case, that of injury to cattle or sheep by dogs, proof of the *scienter* is made unnecessary by 28 & 29 Vict. c. 60.

1. Here, again, English law differs to this extent, that the question whether or not the beast is kept near a public road is of no importance according to the principles of law laid down above. But some analogy to Roman law is afforded by statutory provisions as to

cattle, etc., in the Highway Act of 1835, 5 & 6 Will. IV. c. 50, s. 72, and as to dogs which are dangerous, and not under proper control in 34 & 35 Vict. c. 56.

The damage sustained would be all that would be recoverable in England, not double damages as in the text.

## Tit. X.

*Pr.* It will be convenient here to compare shortly the English and Roman law of agency. This may be the more easily done, as except in the case of the *procurator* (see *infra*), and in some degree in the case of the *magister navis* and *institor*, Roman law never reached a true theory of agency (Hunter, 430). No doubt the inability to regard *mandatum* as anything but a gratuitous contact partly explained this failure (see Bk. III. Tit. XXVI.). Another reason would be that Rome never attained that state of commercial development in which the law of agency assumes large proportions, though the existence of the *actio exercitoria* and the *actio institoria* shows that Roman law was on the way to agreement with the modern law of agency. Apart from those actions and from the *procuratio* (for which see *infra*), a striking similarity in the Roman and English law may be noticed. The prætor extended to persons not under power the authority to contract on behalf of a *paterfamilias*, which was originally confined to the *filiusfamilias* and the slave. In the same way in English law agents are treated in old authorities as servants, *e.g. Southcote's Case*, 4 Rep. 83 b. The law of agency in Roman law, so far as it exists, is an extension of the law of family relations; in English

law it is an extension of the law of master and servant.

The peculiar solemnity of instruments under seal in English law has led to a difference in the mode of appointment of an agent unknown to Roman law. An express appointment of an agent may in general be made in England by word of mouth; but where a deed is to be executed by one man as agent for another, the agent must be authorized by deed (2 Stephen, bk. ii. pt. ii. ch. v.).

English law, as far as regards bringing an action by attorney, offers a pretty complete historical parallel to the Roman *procuratio*. Lord Coke uses the terms *procurator* and attorney as synonymous (Co. Litt., 25 a). The term *proctor*, a shortened form of *procurator*, serves to remind of the Roman law even up to this day, for until 39 & 40 Vict. c. 66, none but proctors were enabled to act for suitors in the ecclesiastical courts. By that Act solicitors were enabled to appear as proctors in the provincial courts of Canterbury and York; and by 40 & 41 Vict. c. 25, s. 17, solicitors may practise as proctors in all ecclesiastical courts. Further, the existence of a *proxy* (or authority, a shortened form of *procuratio*) is still of importance in ecclesiastical and admiralty cases (see note to Tit. XI. 3). In Roman and English law alike three stages in the history of the appointment of an attorney may be noticed. (1) "Formerly, every suitor was obliged to appear in person to prosecute or defend his suit, unless by special licence under the king's letters patent" (3 Stephen, bk. v. ch. iii.). This English rule practically corresponded with the rule of ancient Roman law as given in the text, but it will be noticed that the exceptions are different. The Roman exceptions are, *actiones pro populo, pro libertate, pro tutela;* the English, licence

under the king's letters patent. (2) The next stage was the judicial appointment of the attorney. At this stage in Roman law a *cognitor* was appointed before the magistrate and by a certain form of words (Sandars, *ad loc.*). Similarly in England the attorney was appointed in open court (1 Reeves, 217). The form of writ of appointment taken from Glanvil will be found in 1 Reeves, 218. In the time of Bracton there were several varieties of attorney. The *nuntius*, *essoniator*, *responsalis*, and *attornatus*, all had their different functions (Bracton, 337 b, 345 a, 349 b). (3) Next came the stage when in Roman law the *procurator* was appointed by simple *mandatum* (Hunter, 865), when in English law an attorney may be nominated by parol (*Lord* v. *Kellett*, 2 M. & K. 1).

Between the Roman *procurator* and the English attorney there were some differences, such as might be expected to arise from the differences of the systems. (1) Before 1875, the same person might be a solicitor of the Court of Chancery, an attorney of the superior courts, and a proctor of the Arches or other ecclesiastical court; but now, by Jud. Act. 1873, s. 87, and by 39 & 40 Vict. c. 66, and 40 & 41 Vict. c. 25, cited above, he is called a solicitor of the Supreme Court for all purposes. No such distinction ever existed in Roman law, for a *procurator* was a *procurator* for all purposes. (2) The course of procedure as to *satisdationes* was different (see Tit. XI.). (3) The Roman *procurator* was not a professional man, for the *mandatum* by which the *procurator* was appointed must be gratuitous (see Bk. III. Tit. XXVI.). In Roman law, brother might sue for brother, husband for wife, etc. (Hunter, 865). The nearest approach to the *procurator*, *qua* his being an unprofessional man, is, perhaps, to be found in English law in cases where A sues on behalf of B,

because the benefit or burden of the contract made with A has passed to B. Such a case is that where the assured sues on behalf of the underwriters, or where the master of a ship sues in his own name for freight, as in *Shields* v. *Davis*, 6 Taunt. 65.

*Procuratio* has acquired a peculiar commercial sense in England. In the case of bills of exchange, "a signature by procuration operates as notice that the agent has but a limited authority to sign, and the principal is only bound by such signature if the agent in so signing was acting within the actual limits of his authority" (45 & 46 Vict. c. 61, s. 25).

1. The law of this paragraph is substantially the same in England. The retainer of a solicitor need not be by deed, unless it be to act as attorney to execute a deed, an act not falling within the scope of his ordinary duty as a solicitor. See the preceding note.

## Tit. XI.

2. Security may be required in actions in England. But it differs from the security of Roman law in that—(1) it may be required from either party; (2) it is for costs only, not for the *litis æstimatio*. The law at present depends as to cases in the High Court upon Jud. Act, 1875, Ord. lv. r. 2, the words of which leave a large discretion to the Court: "In any cause or matter in which security for costs is required, the security shall be of such amount, and be given at such time or times, and in such manner and form, as the Court or a judge shall direct."

3. In England, a solictor who takes legal proceedings in the name of another without authority is liable to an

action by any one prejudiced thereby or to summary punishment, as the case may require (Pulling, Law of Attorneys, 417). The action is usually stayed under the powers of Jud. Act, 1875, Ord. vii. r. 1, and the solicitor ordered to pay the costs, as in *Cape Breton Co.* v. *Fenn*, 17 Ch. D. 198. In *Schjott* v. *Schjott*, 19 Ch. D. 94 a solicitor challenged to produce his authority, and, failing to do so, was ordered to pay costs.

The ecclesiastical procedure in England follows that of the Roman law of this paragraph, in that two proxies are generally executed, signed by the parties, attested by two witnesses, and deposited in the registry of the court (2 Phillimore, Eccl. Law, 1220).

As to admiralty cases, it was the ancient practice of the High Court of Admiralty that the proctor should exhibit his proxy; but this practice gradually fell into disuse, and it was assumed that a solicitor who appeared for a party was duly authorized to do so, at the same time the Court, if it thought right, could always require the solicitor to state by name the parties for whom he was authorized to appear (*The Euxine*, L. R. 4 P. C. 8). Ord. vii. r. 1 now governs the practice as between the plaintiff's solicitor and the defendant; but as regards the power of the Court to inquire, the old practice remains in force (Roscoe, Adm. Prac., Ord. vii., note). See Williams & Bruce, pt. ii. ch. i.

5. In Roman law one person might officiously interfere as *negotiorum gestor* in defence of an action against another (Poste on Gaius, iii. 84); English law only allows interference on the ground of interest, as in Probate and Admiralty actions and actions for the recovery of land (Jud. Act. 1875, Ord. xii. rr. 16–22).

## Tit. XII.

*Pr.* In English law there seems to have been originally no period of limitation in respect of any kind of action. The first statutory limitation was of the claim of a defendant in a writ of right by the Statute of Merton (20 Hen. III. c. 8). The earliest limitation of actions which did not concern realty was 1 Hen. VIII. c. 4, as to actions on penal statutes, 3 Reeves, 312. The principal existing Statutes of Limitation are 3 & 4 Will. IV. c. 27, and 37 & 38 Vict. c. 57, as to realty; 21 Jac. I. c. 16, s. 3, as to actions not brought for the recovery of realty. For other statutes see 3 Stephen, bk. v. ch. ix. The rule as to the limitation of suits in equity, so long as a difference between actions at law and suits in equity existed, did not correspond with the Roman rule in the text as to actions founded upon *prætoria jurisdictio*, for in this case equity followed the law. "Where the remedy in equity is correspondent to the remedy at law, and the latter is subject to a limit in point of time by the Statute of Limitations, a Court of Equity acts by analogy to the statute, and imposes on the remedy it affords the same limitation" (Lord Westbury in *Knox* v. *Gye*, L. R. 5 H. L. 674).

1. By the common law of England, an executor is not liable for the tortious acts of the deceased, for the action died with the person by whom the wrong was committed. Except so far as altered by 3 & 4 Will. IV. c. 42, s. 2 (by which an action of trespass or trespass on the case is maintainable against the executor or administrator for an injury committed within six months before the death of the deceased, provided the action be brought within six months after he has taken upon himself administration of the deceased's estate),

this is still the law. For the cases to which it applies see 2 Williams, Ex., pt. iv. bk. ii. ch. i. s. 1. An action on a penal statute does not pass (*id.*). For the continuance by the executor of actions commenced by the deceased, see 1 William, Ex., pt. ii. bk. iii. ch. iv. As to the liability of the executor in matters of contract, "the general rule has been established from very early times with respect to such claims as are founded upon any obligation, contract, debt, covenant, or other duty that the right of action, on which the testator or intestate might have been sued in his lifetime, survives his death, and is enforceable against his executor or administrator" (2 Williams, Ex., pt. iv. bk. ii. ch. i. s. 1). By Jud. Act, 1875, Ord. i. r. 1, "an action shall not become abated by reason of the . . . death . . . of any of the parties, if the cause of action survive or continue." This rule does not alter the previously existing rules of law upon the subject of the survival of actions, it simply adopts for all courts the old Chancery procedure (Wilson, Jud. Acts, note *ad loc.*).

2. Practically the same rule exists in English law. A claim may be barred by matters occurring after action brought, *e.g.* by payment into court by the defendant of a sum accepted in satisfaction by the plaintiff (Jud. Act, 1875, Ord. xxx.), or by pleading a good ground of defence which has arisen pending the action (Ord. xx.), the old plea *puis darrein continuance*, for which see 3 Stephen, bk. v. ch. x.

## Tit. XIII.

This will be a convenient place to notice the analogy between the Roman and English systems of pleading.

There seems to be a very general consent among legal writers that the English system of procedure was based upon the Roman, certainly in the courts of equity, probably in the courts of common law. See Story, Equity Pleadings, s. 14; 1 Spence, 206; 1 Starkie, Law of Evidence, 4; Stephen on Pleading, 402. The use by Bracton of the technical terms of Roman law as applied to English actions is a strong confirmation of this view. Thus, in 413 b, he thus defines the original writ: "*Breve quidem cum sit formatum ad similitudinem regulæ juris, quid breviter et pancis verbis intentionem proferentis exponit et explanat, sicut regula juris, rem quæ est breviter enarrat.*" The issue he calls *litis contestatio* (373 a). He uses the terms *exceptio* (*e.g.* 187 b, 242 b, 310 b, and the subject of the whole of Tract V. is *De Exceptionibus*), *replicatio*, and *triplicatio* (399 b).

The historical development in Rome and England proceeded upon very similar lines. One might perhaps distinguish three periods. (1) In the first period the action imitated as far as possible the natural conduct of persons who were disputing, but who suffered their quarrel to be appeased. This, the period of the *legis actio* in Roman law (Maine, ch. x.), in which the proceedings seem to have been entirely verbal, corresponds roughly to the period of oral pleading in England. Pleading seems to have been oral in the time of Bracton, as far as may be judged from such passages as 372 b (see Stephen on Pleading, 24). Pleadings were probably not reduced to writing until the reign of Edward III. (*id.*, 404). (2) The period of *formulæ* at Rome is analogous to the period of the original writ in England. In both cases the slightest failure in form was, as a rule, fatal. The words of the constitution of Constans, *juris formulæ aucupatione syllabarum insidiantes* (Cod. ii. 58, 1), may be compared with the words of an English writer:

"The assigning of a writ of a particular frame and scope to each particular cause of action, the appropriating process of one kind to one action and of a different kind to another, these and the like distinctions rendered proceedings very nice and complex, and made the conduct of an action a matter of considerable difficulty" (1 Reeves, 147). The number of *formulæ* was limited, and so was the number of writs. In both cases fictions and equity came to mitigate the rigour of the law (see Tit. VI. 3). In England this result was largely obtained by the framing of the action of trespass on the case under the powers of the Statute of Westminster the Second (see note on Tit. III. 16), and by the extension of the action of *assumpsit* to non-feasance (2 Reeves, 394, 508). To a less extent the same difficulties were found in the period of special pleading which followed the writ period, owing to the particularity with which the claim must be set out and the difficulty of amendment. See *Dovaston* v. *Payne*, 2 Smith, L. C., for an example of such a case. The difficulties were gradually remedied by a long series of statutes, of which the most important were the Common Law Procedure Acts, 1852 and 1854, and the Jud. Acts. (3) The third period at Rome was the period subsequent to the abolition of *formulæ* in 342, in England the period subsequent to the above-mentioned enactments.

Some points of difference between Roman and English pleading may be noticed, in addition to the difference between the *exceptio* and the plea or statement of defence mentioned below. (1) The Roman forms at whatever period applied to all courts, for at Rome law and equity were alike administered by the prætor, who was supreme civil judge, even in the Centumviral Court (Mackenzie, pt. v. ch. i.). See note on Bk. I. Tit. II. 7. In England two systems of pleading, in which even the

technical terms were different, existed side by side in the common law and equity courts up to 1875. And even now, though the pleading in all branches of the High Court is assimilated by the Jud. Acts, the pleading in the County Courts and in the ecclesiastical courts is of a different nature. What would be a *statement of claim* in the High Court is a *plaint* in the County Court, a *libel* or *articles*, according as the suit is civil or criminal, in the Arches Court (2 Phillimore, Eccl. Law, 1289). (2) The language of pleading was a matter in which, at least until the end of the formulary system, there could have been no difficulty at Rome, for it must of necessity have been Latin. In England it seems to have been oral in French up to 36 Edw. III. stat. 1, c. 15, then Latin until 4 Geo. II. c. 26 (Stephen on Pleading, 404). (3) During the formulary system the question to be tried was settled by the prætor, who delivered to the *judex* the proper *formula* (Mackenzie, pt. v. ch. ii.). In England the pleadings have always been *primâ facie* the act of the party, not the act of the law. But the Court has some control over them, and so far they approach the Roman system, *e.g.* no pleading subsequent to a reply other than a joinder of issue can be pleaded without the leave of the Court or a judge (Jud. Act, 1875; Ord. xxiv. r. 2); and where it appears to a judge that the statement of claim or defence or reply does not sufficiently define the issues in dispute, he may direct issues to be prepared, or prepare them himself (Ord. xxvi.). And by Ord. xxvii. large powers of amendment are conferred on the Court or a judge. (4) In England the pleadings to some extent determine the tribunal; at Rome it was not so. The prætor or *judex* was judge alike of law and fact (Sandars, Introd. s. 106), so that whether the issue (in English legal language) was one of law or one of fact, the pleadings

were treated in the same manner. But in English law the maxim has always been "*Quæstionibus facti non respondent judices, quæstionibus legis non respondent juratores*," as it is expressed by Lord Westbury in *Fernie* v. *Young*, L. R. 1 H. L. 78. A good illustration of this principle is seen in *Dublin, Wicklow, and Wexford Railway Co.* v. *Slattery*, 3 App. Cas. 1155. In cases in the Queen's Bench Division the rule still applies, and the right of a party to have issues of fact tried by a jury is absolute (*Sugg* v. *Silber*, 1 Q. B. D. 362), subject to the qualification contained in Jud. Act. 1875, Ord. xxxvi. r. 26. But issues of law, raised by special case or demurrer, or occurring in the course of the trial in actions in that division, and in the Chancery and Admiralty Divisions issues of law and fact alike, are for the judge. In the latter divisions, as at Rome, the judge is judge of law and fact.

*Pr.* The *exceptio* may be compared, on the one hand, with the English counter-claim; on the other hand, with the English plea or statement of defence. It resembles the counter-claim in that *reus in exceptione actor est* (Dig. xliv. 1, 1). See, as to this, note to Tit. VI. 20. It resembles the plea or statement of defence, in that it is the defendant's answer to the plaintiff's claim. But this resemblance is only a very general one. Among other points of difference are the following: (1) In *actiones bonæ fidei exceptiones* were not used (see note on Tit. VI. 28). But though the High Court in England has power under Jud. Act, 1873, s. 24 (7), to grant all the relief necessary to the defendant, it is still incumbent on him to set forward in his statement of defence the circumstances on which he relies, so far as he can. The definition of pleading by Buller, J., in *Read* v. *Brookman*, 3 T. R. 159, is still applicable in English law; "Pleading is the formal

mode of alleging that on the record which would be the support or defence of the party on evidence." It may, perhaps, be said that although every action is now to some extent an action *bonæ fidei* (Tit. VI. 28, note), the theory of *exceptiones* cannot be carried as far as in Roman law. (2) The *exceptio* consisted exclusively of equitable allegations invalid by the civil law, as of agreements of imperfect obligation, or founded upon a *naturalis obligatio*. The nearest approach to an *exceptio* was perhaps the equitable plea at common law before the Jud. Acts (Poste on Gaius, iv. 115); but now, since Jud. Act, 1873, s. 24, law and equity are concurrently administered. It may be said, too, that agreements of imperfect obligation, not being enforceable, are, as a general rule, in England incapable of being used as a defence to an action, though they may be used incidentally for other purposes. For instance, the benefit of an informal agreement may be shown as a fact, and the party who has had some benefit from such execution cannot treat the benefit as a nullity, or, in the language of Roman law, the receipt of the benefit is available as an *exceptio* (Pollock, ch. xii.). In *Ex parte Wilkinson*, 22 Ch. D. 788, a *bonâ fide* agreement, though not technically binding, was held sufficient to prevent an assignment from being fraudulent under 32 & 33 Vict. c. 71, s. 6 (2). In *Read* v. *Anderson*, 10 Q. B. D. 100, an agent was held entitled to be indemnified for payment of a debt of honour on his principal's account.

The doctrine of consideration has an important bearing upon the difference between the two systems as to *exceptiones*. See note on Bk. III. Tit. XIV. 2.

The term *exceptio* is used by Bracton; thus he speaks of the *exceptio* to an assize of darrein presentment (242 b), of novel disseisin (187 b), of dower (301 b),

and the fifth *Tractatus* has the title *De Exceptionibus*. It seems most probable that he was in this case importing into English practice a purely foreign element, as a theory of pleading was scarcely formed at that time, and pleadings were oral (Stephen on Pleading, 435). The term has come down to recent times in the "Bill of Exceptions," though this had nothing more than a nominal resemblance to the *exceptio*. The bill of exceptions was a formal document, excepting to the direction of the judge at the trial as to the legal effect or admissibility of evidence. It lay direct from the trial at Nisi Prius to the Court of Exchequer Chamber (3 Stephen, bk. v. ch. x.). It was abolished by Jud. Act, 1875, Ord. lviii. r. 1.

The exceptions used in Chancery practice before the Judicature Acts had more resemblance to the *exceptiones*. They might be taken to pleadings for scandal (1 Daniell, ch. vi. s. 4), or to answers to interrogatories for scandal or insufficiency (1 Daniell, ch. xvii. s. 4). It seems that in the present practice the same result is obtained by motion to strike out scandalous pleadings or for a further and better answer (1 Daniell [edit. 1882], ch. ix. s. 1; Jud. Act, 1875, Ord. xxvii. r. 1).

The "exceptive allegation" of old ecclesiastical practice has become obsolete since the oral examination of witnesses (2 Phillimore, Eccl. Law, 1297).

*Iniquum.* Roman *æquitas* carried with it a sense of levelling (Maine, ch. iii.). English equity connotes more than any other signification that of equality. One of the fundamental maxims of any work on equity is "Equality is equity." *Æquitas* is used, as is equity, to mean the mitigation of strict law in accordance with justice, *e.g.* Dig. l. 17, 90. In other cases each term is used in a sense peculiar to its own system; thus *æquitas* may signify the agreement between the rules of positive

law and of natural right (*naturalis æquitas*, Dig. ii. 14, 1, *pr.*; xxxvii. 5, 1, *pr.*); equity may denote the particular combination of facts on which a party bases an equitable right, as in equity to a settlement, equity of redemption, equity to have securities specifically applied (*Ex parte Waring*, 19 Ves. 345).

1. With this paragraph may be compared those cases of fraud in English law which might be a good defence to an action in equity, but not at law. Thus it was at law no reply to a defence setting up the Statute of Limitations that the defendant had fraudulently concealed the cause of action, while in equity it was a good reply. Of course, since the Judicature Acts the equitable rule is followed (*Gibbs* v. *Guild*, 8 Q. B. D. 296; 9 Q. B. D. 59). An action of deceit would not lie at law against an infant upon an assertion that he is of full age, but in equity he was liable to the extent of any advantage thereby gained by him, though not as upon the contract itself (Pollock, ch. ii.).

2. See note to Bk. III. Tit. XXI.

3. See note to Bk. III. Tit. XXIX.

4. See note to Bk. II. Tit. XXIII. 6.

5. The term *res judicata* is often found in English judgments and text-books, and the Roman maxim *Res judicata pro veritate accipitur* (Dig. i. 5, 25) has been adopted by English law (Broom, Legal Maxims, 333). But it is to be observed that it bears a sense somewhat different to that which it bore in Roman law. (1) In Roman law it was available only as an *exceptio*; in English law it is available either as an estoppel if pleaded, or as evidence if not pleaded (*Duchess of Kingston's Case*, 2 Smith L. C.). (2) In English law the judgment may be a foreign one, hence difficulties unknown to Roman law have arisen with regard to the binding effect of a foreign judgment in an action in an

English Court for the same cause. (See 4 Phillimore, ch. xlvi.).

8. The terms *peremptoriæ* and *dilatoriæ* appeared in English law in the peremptory and dilatory pleas of the action at common law before the Judicature Acts. The principle of these was the same (subject to the fundamental differences between the *exceptio* and the plea) as those of the corresponding *exceptiones*. Peremptory pleas, or pleas in bar, were founded on some matter tending to impeach the right of action itself, *e.g.* denial of the making of the contract on which the plaintiff sued; dilatory pleas were founded on some matter of fact not connected with the merits of the case, but such as might exist without impeaching the right of action itself, *e.g.* that the contract on which the plaintiff sued was not one of which the Court had jurisdicton to take cognizance. Such pleas were either to the jurisdiction, of suspension, and in abatement (3 Stephen, bk. v. ch. x.). By Jud. Act, 1875, Ord. xix. r. 13, "no plea or defence shall be pleaded in abatement."

11. In English law the case of misjoinder or non-joinder of parties is cured by Jud. Act, 1875, Ord. xvi. r. 13. The nearest analogy to the *exceptio propter infamiam* would perhaps be found in the application to substitute for a plaintiff or defendant convicted of felony the administrator to whom his interest passes by 33 & 34 Vict. c. s. 10, for the felon cannot sue in his own name (s. 8).

## Tit. XIV.

*Pr.* Before the Judicature Acts what is now called the reply (for which see Jud. Act, 1875, Ord. xxiv.)

was called the replication in the common law courts. But what corresponded more nearly to *replicatio* than the simple replication was the replication by way of new assignment, where the defendant pleaded justification in trespass, and the plaintiff replied trespass in excess of the justification. New assignment was abolished and amendment of the statement of claim susbtituted in its place by Jud. Act. 1875, Ord. xix. r. 14. Another analogy is found in the old plea in confession and avoidance (Stephen on Pleading, 188), though this, of course, was alleged by the defendant, not, as a *replicatio* was, by the plaintiff.

1. *Duplicatio* is a term unknown to English law. Subject to the differences already mentioned under the head of *exceptiones*, it would roughly correspond to the rejoinder of English law before the Judicature Acts. Since those Acts there seems to be no technical name for any pleading after the reply. No pleading subsequent to reply other than a joinder of issue can be pleaded without leave (Jud. Act, 1875, Ord. xxiv. r. 2).

2. The *triplicatio*, like the *replicatio*, but not the *duplicatio*, is transplanted into Bracton (399 b). It stood to the *duplicatio* in something of the same position as the rejoinder to the surrejoinder.

3. English pleading at common law before the Judicature Acts went as far as the rebutter and surrebutter (3 Stephen, bk. v. ch. x.); beyond that point the pleadings had no distinctive names.

4. The two cases put in this paragraph are in close accordance with the English law on the subject. Thus a covenant to give time to or not to sue the principal debtor will discharge the surety, unless it be qualified by a proviso reserving the rights of the creditor against the surety (*Union Bank of Manchester* v. *Beech*, 3 H. & C. 672). With the second case compare the English

case of *Petty* v. *Cooke*, L. R. 6 Q. B. 790, where after making payment the principal became bankrupt and the payment was avoided as a fraudulent preference, and it was held that the surety was not discharged.

## Tit. XV.

*Pr.* The word "interdict," though used in Scotch law, is not now a technical term of English law. Bracton uses the term several times, *e.g.* 103 a, where, it is important to notice, he includes *interdicta* among *actiones*. So in Roman law the distinction between *interdictum* and *actio* has only a historical significance (Hunter, 839).

The interdict may be compared, according to the aspect in which it is looked at, with the injunction, the mandamus, or the possessory action of English law. But at the outset it is to be noticed that (a) *interdicta* were issued by the prætor *principaliter*, or in his capacity of a legislative authority, the prætor thus making new law for the occasion (Ortolan, Exp. s. 2007; Poste on Gaius, iv. 138 [2nd ed.]), while the injunction, mandamus, or possessory action were simply applications of existing law; (b) *interdicta* might be employed in cases which combined obligation with a real right, as the *interdictum Salvianum* (Poste, *ubi supra*); (c) they were the special remedies for disturbance of sacred or public places (*ibid.*). In all these cases they seem to differ from injunctions, etc.

The injunction has already been compared, in one of its aspects, with the *prætoria stipulatio* (Bk. III. Tit. XVIII.). So far as it is a command of the Court, it

resembles an interdict; but (1) the injunction may be used for the protection of property as well as of possession, and of legal as well as equitable rights, whereas the interdict protected possessory rights that could be vindicated in no other way (Hunter, 836). On the other hand, the injunction was used (but not since the Jud. Act, 1873, s. 24 (5)) to restrain proceedings at law, which was not one of the functions of the interdict, as it was impossible in a system where the prætor was the universal judge. (2) The interdict was not a rapid and summary procedure, but imitated the *actio* in every respect (Hunter, 836). It would therefore resemble the action for an injunction or a claim for damages combined with a claim for an injunction rather than the interlocutory injunction. (3) The interdict commanded an act to be done, or restrained from committing a certain act. Most injunctions are prohibitory, though they may sometimes be mandatory, as an injunction to remove buildings (*Gaskin* v. *Balls*, 13 Ch. D. 324). In their historical origin the remedies are analogous; the interdict was the invention of the prætor, the injunction of the chancellor. So far as it is a command to do an act, it resembles the mandamus. It differs from the mandamus in that (1) the mandamus is a common law and not an equitable remedy; (2) the mandamus is addressed to a person or persons in a public capacity, commanding the performance of a public act (Addison, ch. xxiv. s. 1); (3) "the Court of Queen's Bench has never, in cases of applications for a mandamus to judges or courts of a judicial character, assumed a power to do more than to direct them to hear and decide; it has never dictated to them in what manner they are to decide" (*Ex parte Cooke*, 29 L. J. Q. B. 68, Cockburn, C.J.). By Jud. Act, 1873, 5, 25 (8), the High Court of Justice has a very wide discretion as to granting a

mandamus. For the analogy between interdict and injunction and mandamus, see further Poste on Gaius, iv. 166; 4 Phillimore, ch. xlvii. The interdict resembles, perhaps, most of all the old possessory action of English law, which was possibly directly suggested by it (Bigelow, 170, 173). The most frequent form of such an action in the old law, the *assisa novæ disseisinæ*, is identified by Bracton (103 b) with the interdict *unde vi*. It may have been introduced by ecclesiastical judges, but its first appearance in legal history is in a statute, the Assize of Northampton, 1176. See 3 Twiss' Bracton, Introd. The assize of novel disseisin fell within the class of *possessory*, not of *droitural* actions, the two classes into which real actions were divided. Like the interdict, it protected seisin or possession (*seisina* and *possessio* are used indiscriminately by Bracton, Güterbock, ch. xi.) rather than property. All that was necessary in the assize was to prove the demandant's or his ancestor's possession (3 Stephen, bk. v. ch. vii.). Another striking parallel is afforded by the fact that with the advance of society both the interdict and the assize of novel disseisin fell into disuse as remedies; the interdict was obsolete in the time of Justinian (par. 8), the assize of novel disseisin was abolished by 3 & 4 Will. IV. c. 27. The action of ejectment, which seems to have become the general mode by which to try questions of title about the reign of Queen Elizabeth (see note to Tit. II. 1), had for some time previously from its greater convenience superseded other forms of possessory action. Thus, in Roman and English law alike, the possessory remedy superseded the proprietary action, the movement in both systems being exactly parallel (Maine, ch. viii.). The action of ejectment has now itself been superseded by the action for the recovery of land (Tit. VI. 16, note). It may be noticed

that the assize of novel disseisin, as a real action, fell within the exclusive cognizance of the Court of Common Pleas (3 Stephen, bk. v. ch. v.), and so far was unlike the interdict of the prætor. For the difference between the Roman and English conceptions of possession, see note to Bk. II. Tit. VI.

1. An injunction may be granted against trespass, pursuant to the powers given by Jud. Act, 1873, s. 25 (8). In some cases where the Roman procedure was by interdict, the English would probably be by indictment for forcible entry, or by a claim for damages. Damages for an independent wrong committed in the course of a forcible entry may be recovered even by a person whose possession was wrongful (*Beddall* v. *Maitland*, 17 Ch. D. 174). *Qu.* whether this would have been the case in Roman law. For a case of an injunction against obstructing a navigable river, see *Attorney-General* v. *Terry*, L. R. 9 Ch. 423.

2. A mandamus may be obtained to restore a public officer to a freehold office from which he has been wrongfully dismissed (Addison, ch. xxiv. s. 1). Restitution of land or other property (other than money) may be enforced by writs of possession and delivery respectively under the powers of Jud. Act, 1875, Ord. xlviii., xlix., the latter re-enacting 17 & 18 Vict. c. 125, s. 78.

With the *interdictum exhibitorium* may be compared the writ of *habeas corpus ad subjiciendum* (3 Stephen, bk. v. ch. xii.), or the order for production of a *cestui que vie* under 6 Anne, ch. 18 (Williams, R. P., pt. i. ch. i.). A recent example of an order for such production will be found in *Re Owen*, 10 Ch. D. 166.

3. The interdict *quorum bonorum* is identified by Bracton (103 b.) with the *assisa mortis ancessoris*, or assize of *mort d'ancestor*, which was, like the assize of novel disseisin, abolished by 3 & 4 Will. IV. c. 27,

the remedy by ejectment having practically superseded it.

Distress, so far as it resembles the *interdictum Salvianum*, does not need judicial sanction (see Tit. VI. 7).

4. The same advantage is conferred by possession in English law, which has adopted the Roman maxim, *In pari causa possessor potior haberi debet* (Dig. l. 17, 128). Thus in the case of *Every* v. *Smith*, 26 L. J. Ex. 344 it was held that a possessory right was sufficient to sustain an action of trespass, even after it appeared that the plaintiff had no legal title.

The conditions *nec vi nec clam nec precario* have been adopted in English law as the basis of prescription (see Bk. II. Tit. VI., *Pr.*), but the sense of the words is not quite the same in Roman and English law. "The edict of the prætor that possession must not be *vi vel clam*, as I think, is so far adopted in English law that no prescriptive right can be acquired where there is any concealment, and probably none where the enjoyment has not been open" (Lord Blackburn in *Dalton* v. *Angus*, 6 App. Cas. 827). The learned lord then proceeds to point out that there is a difference in cases where the enjoyment was in the beginning wrongful, and cases where it was not, a right being acquired more easily against the owner of the servient tenement in the latter case than in the former. Probably the question would not have arisen in Roman law. It was rectitude of conduct on the part of the dominant owner, and not knowledge on the part of the servient owner, which that law required (see article upon *Dalton* v. *Angus* in the *Law Magazine and Review* for May, 1879).

5. The rule is the same in English law. Goods delivered to a servant and deposited in the master's cart were held to be constructively in the possession of the master (*Reg.* v. *Reid*, Dearsl. C. C. 257). Where

a landlord pleaded seisin in fee, and the seisin was traversed, the traverse was not supported by proof that the land was in the occupation of a tenant (*Stott* v. *Stott*, 16 East 350).

For an instance in which possession, once acquired, was continued by intention, see *Reg.* v. *Townley*, L. R. 1 C. C. R. 315. But intention alone would not have sufficed, any more than in Roman law, to acquire possession. See note on Bk. II. Tit. VI., *Pr.*

6. An action for the recovery of land would now be the remedy in England, with a writ of possession if necessary (Jud. Act 1875, Ord. xlviii.).

English law does not go so far as to deprive an owner entering by violence upon his property of such property, but punishes him for forcible entry, if his conduct amount to it. "If a trespasser has gained possession, the rightful owner cannot use force to put him out, but must appeal to the law for assistance" (Fry, J., in *Beddall* v. *Maitland*, 17 Ch. D. 188).

## Tit. XVI.

*Pr.* In English law protection against vexatious litigation is obtained by (1) enforcing security, (2) liability to costs on the part of the unsuccessful party, (3) liability to an action. For security in actions in the High Court, see Tit. XI. 2. Security for costs of appeal to the Court of Appeal may be directed "under special circumstances" (Jud. Act, 1875, Ord. lviii. r. 15). Insolvency (*Waddell* v. *Blockey*, 10 Ch. D. 416), poverty (*Harlock* v. *Ashberry*, 19 Ch. D. 84), foreign domicile (*Grant* v. *Banque Franco-Egyptienne*, 2 C. P. D. 430), have all been held special circumstances under this rule.

Security for costs on appeal to the House of Lords is regulated by Ord. 10 of the Standing Orders of the House framed in pursuance of the Appellate Jurisdiction Act, 1876. The unsuccessful litigant has, as a general rule, to pay the costs, as far as regards actions tried by a jury; this is specially provided for by Jud. Act, 1875, Ord. lv. r. 1). As to liability to an action, it seems that an action will lie against a person who has knowingly brought an action against another which was utterly without ground (see the authorities in the judgment of Blackburn, J., in *Wren* v. *Wield*, L. R. 4 Q. B. 730). But malice and want of probable cause must be proved (*Ram Coomar Coondoo* v. *Chunder Canto Mookerjee*, 2 App. Cas. 186).

1. For the defendant's oath, see Bk. II. Tit. XXIII. 12. An example of an oath very similar to the one in the text is the oath taken in Bracton's time by the party in the assize of *utrum* (Bracton, 290 b).

For double and treble damages, see Tit. V. 1; VI .23.

The advocate in England, whether barrister or solicitor, takes no oath in the case. Any misconduct on his part is provided against by the powers with which the Inns of Court of the Incorporated Law Society are invested against their own members.

The rule as to damages in an action for maliciously and without probable cause setting the law in motion is probably the same in England. Any legal damage that has been sustained may be recovered (*Cotterell* v. *Jones*, 11 C. B. 713). In *Farley* v. *Danks*, 4 E. & B. 493, the plaintiff recovered £500 against the defendant for falsely and maliciously procuring the plaintiff to be adjudicated a bankrupt.

2. For *infamia*, see Bk. I. Tit. XXVI. 6.

## Tit. XVII.

*Pr.* The *judex* in the time of the *judicia ordinaria* perhaps approached more nearly to the English arbitrator or referee than to the English juror or judge. He was like the arbitrator in that he was in the first instance chosen by the parties, and only in case of their inability to agree nominated by the prætor; that he was judge of law and fact; and that he was bound as strictly by the *formula* as the arbitrator is by the order of reference. He was unlike the arbitrator in being liable for quasi-delict to a greater extent, for he might be liable for a mistake of law, which the arbitrator is not; he is also unlike in being nominated exclusively *post litem motam*, while an arbitrator may be appointed before the matters in difference have been made the subject of litigation. He was like the juror to a less extent. The history of the *judex* and the juror was different. The *judex* was originally an arbitrator, the juror a witness. Hence, unlike the juror, he sat alone (except in the case of *recuperatores*), he was judge of law and fact, he was originally of the senatorial order, the class in whom litigants would have most confidence. He resembled the juror in that he was taken from the *album judicum*—something like the English jury-panel—that he was not a professional lawyer, and that he was sworn. The latter fact was probably regarded as of less importance at Rome than in England, for of Cicero's expression *judices jurati* the Romans adopted the first or judicial element as the current term; we have adopted the second, bringing the fact of the oath into prominence, no doubt for the reason that at the time of the civil jury becoming the general mode of trial systematic judicial perjury was one of the worst features of the

age. See Hallam, Middle Ages, ch. ix. pt. i. The word *jurata* occurs as early as 1172 (Bigelow, 125). The *judex* was like a judge, so far as a judge has only partial cognizance of the case. The nearest analogy would be a judge of the High Court trying a probate issue, or a County Court judge trying a case sent down to him from the High Court. The earliest judges in England seem to have been non-professional, but the step by which unprofessional arbitrators became professional judges was taken much sooner in England than at Rome. It was not till after the reign of Diocletian that the *judex* became a professional judge, and the lay arbitrator was dispensed with. The *judex* of the times of Justinian was much the same as the English magistrate or judge, all *judicia* being now *extraordinaria* (Poste [3rd edit.], 518, Ortolan, s. 428).

In two cases Roman law presents a striking similarity to ours. (1) The *judices pedanei* were, no doubt, inferior judges, though there is great doubt as to their exact position and functions (Ortolan, s. 431). They seem to have tried cases in local courts up to the amount of three hundred *solidi* (Sanders, Introd. s. 110). If this be the case, they afford a very close parallel to the English County Court judges, who try cases in local courts varying in amount according to the jurisdiction, which, limited to claims of £50 in ordinary cases (13 & 14 Vict. c. 61), extends to claims of £300 in admiralty (31 & 32 Vict. c. 71), £500 in equity (28 & 29 Vict. c. 99), and is unlimited in bankruptcy. The County Court judge, too, where there is no jury, is judge of law and fact. (2) *Recuperatores* resembled County Court jurors in that they might be five in number, the number of the County Court jury (9 & 10 Vict. c. 95, s. 73); but five was not the invariable number (Ortolan, s. 164). They, like the County Court jury, seem to

have tried cases of immediate importance and small amount; unlike the County Court jury, and more like the old English courts of *pie poudre*, they were *repente apprehensi* (Plin. Ep. 3, 20). The County Court jury is duly summoned from the jury-list (9 & 10 Vict. c. 95, s. 72). With the *repente apprehensi* compare (in the High Court, but not in the County Court) the *tales de circumstantibus*, or jury of bystanders, which, by 6 Geo. IV. c. 50, s. 37, may be awarded at Nisi Prius in case the duly summoned jurors are exhausted without a full jury being obtained. Another difference that may be noticed is, that a majority of the *recuperatores* gave a verdict (Mackenzie, pt. v. ch. i.); the County Court jury must be unanimous (9 & 10 Vict. c. 95, s. 73).

The *officium judicis* may be compared with the very similar language used by Blackstone of the English judge, "he being sworn to determine, not according to his own private judgment, but according to the known laws and customs of the land; not delegated to pronounce a new law, but to maintain and expound the old one" (1 Stephen, Introd., s. 3).

The term *judex*, when used in English law, invariably means a judge. It is so used in Bracton and in the well-known maxim, *Quæstionibus facti non respondent judices, quæstionis legis non respondent juratores* (see note to Tit. XIII.).

6. "It is not improbable that equity, which has borrowed so largely from the civil law, may have assumed jurisdiction to settle boundaries from the proceeding in that law known as *actio finium regundorum*" (note to *Wake* v. *Conyers*, 2 White & Tudor, L. C.). The English Court has no power as of course to issue commissions to fix boundaries of legal estates. Some equity must be superinduced by the acts of the

parties, as fraud or confusion (*ibid.*). The Judicature Acts have not altered the law in this respect (*Lascelles* v. *Butt*, 2 Ch. D. 593).

## Tit. XVIII.

The criminal law of Rome had, no doubt, some influence upon English law, but how much it is difficult to say (1 Stephen, Hist. C. L., ch. ii.). In addition to the cases mentioned below as they occur, the following differences may be noticed between the two systems. (1) The area of crime was not coterminous, *e.g.* adultery, removing landmarks, bringing in strange religions, are peculiar to Rome; theft as *primâ facie* a crime to England (see Tit. I. 1). (2) The jurisdiction over all crimes seems to have been in the same courts at Rome (unless, indeed, the *judices pedanei* had jurisdiction over smaller offences), for the *judices* in general were the same in civil and criminal matters (Ortolan, s. 285); in England a number of offences are disposed of by courts of summary jurisdiction. (3) In English law there is, unless fixed by statute (as in cases of treason and smuggling), no limitation of the period during which a prosecution may be preferred; in Roman law, lapse of time barred prosecution (Mackenzie, pt. vi. ch. iii.). (4) The Roman verdict was *Condemno*, *Absolvo*, or *Non liquet;* the English must be Guilty or Not Guilty, English law not recognizing, as does the Scotch, any middle course. The Roman verdict was by ballot, and unanimity was unnecessary. (5) The procedure was different in the two systems. The number of the Roman *judices* seems to have been variable, certainly in the time of the *quæstiones*, when they reached as many

as one hundred, probably in the time of the empire; the functions, however, of the *judices* under the empire are very uncertain (1 Stephen, Hist. C. L., 45; Forsyth, Hist. of Trial by Jury, ch. i.). Torture was allowed at Rome, chiefly in the case of slaves; it was practised in England (3 Reeves, 426), but was never legal (1 Stephen, Hist. C. L., 222). The rules of evidence were different: *e.g.* parents and children were inadmissible witnesses against each other at Rome; husbands and wives in most cases in England. Roman law, as a general rule, required two witnesses to prove a fact (Dig. xxii. 5, 2); in English law corroborative evidence is only necessary in the case of an accomplice. In such a case it is the custom to direct the jury not to convict upon the uncorroborated testimony of an accomplice; but if they do convict, the conviction is lawful (*Reg.* v. *Stubbs*, 25 L. J. M. C. 16)—a very anomalous state of things. Depositions of living persons, as of bishops, were sometimes admissible in Roman law (Cod. i. 3, 7). (6) The punishments differed very much. The punishments of Roman law were in general much more severe than the punishment of modern English law. English law allows capital punishment only in the cases of treason, murder, piracy with violence, and setting fire to dockyards and arsenals (1 Stephen, Hist. C. L., 475). (7) An appeal lay in Rome upon the facts; in England it lies only upon a point of law, either by writ of error or by a case reserved under 11 & 12 Vict. c. 78.

For the Roman criminal law generally, see Maine, ch. x.; Hunter, 902; 1 Stephen, Hist. C. L., ch. ii.; Mackenzie, pt. vi.; Ortolan.

1. The Roman division adopted here and in Dig. xlvii. and xlviii. of prosecutions into *publica judicia* and *extraordinaria crimina* rested upon a merely historical

basis (Sandars, *ad loc.*). To this extent the division resembles the English division of indictable crimes into felonies and misdemeanors, a division also rather historical than resting upon any fundamental difference in the gravity of the crimes. The pettiest larceny is felony; perjury of the grossest character a misdemeanor.

In England, felonies and misdemeanors are usually prosecuted by indictment; misdemeanors of a grave kind may be proceeded against by information at the suit of the Crown (4 Stephen, bk. vi. ch. xviii.). The rule as to the capacity to prosecute is in theory the same as that of the text. "Any member of the community, generally speaking, may prosecute for all offences in the name of the sovereign, but the task is usually devolved on the person injured by the crime, though, in some cases, the prosecution is conducted by the Crown" (Mackenzie, pt. vi. ch. v.). The Crown is in all cases the nominal prosecutor, *i.e.* the proceedings are invariably entitled *Regina* v. ——. Thus the Crown is supreme judge and supreme prosecutor in England, supreme judge only at Rome. By an Act passed in 1879 (42 & 43 Vict. c. 22), a Director of Public Prosecutions is appointed for the purpose of taking action in cases which appear to be of importance or difficulty, or in which special circumstances exist. There were certain persons in Roman law who were incapacitated from prosecuting (Sandars, *ad loc.*); these disabilities are unknown in England.

2. The word "capital" in English law applies purely to crimes punishable by death, as to which see above. For the Roman sense of *capitalis* see Bk. I. Tit. XVI.

For *deportatio* see Bk. I. Tit. XII. 1. The other punishments are unknown to English law. The doctrine of corruption of blood, now obsolete, bore some analogy to *infamia* (see Bk. III. Tit. I. 5). Glanvil, bk. ii.

c. 7, uses the phrase *perennis infamiæ obprobium* for the disgrace attaching to the person vanquished in the *duellum*.

3. Mr. Justice Stephen (1 Hist. C. L. ch. ii) compares the *Leges Juliæ* as consolidating enactments with the Criminal Law Consolidation Acts, 1861.

*Majestas* has a history different from that of treason. *Majestas* was originally a crime against the sovereign people, to whose position the emperor succeeded; treason was always against the king; but to a great extent *majestas* corresponds to the English treason. "When disloyalty so rears its crest as to attack even majesty itself, it is called, by way of eminent distinction, *high* treason, being equivalent to the *crimen læsæ majestatis* of the Romans" (4 Blackstone, 75). Since *petit* treason has been abolished by 9 Geo. IV. c. 31, it seems useless to retain the term *high* treason. Like *majestas*, treason rests upon a statute (25 Edw. III. c. 2), a statute which has led to great difficulties of construction (see Hallam, Const. Hist., ch. xv.; 2 Stephen, Hist. C. L., 244). The law of *majestas* was far more oppressive than the law of treason ever became, even in the worst times. The Roman law under Tiberius (for examples, see 5 Merivale, Hist. of the Romans under the Empire, ch. xliv.) went farther than even the English law under Henry VIII. (see 4 Stephen, bk. v. ch. vi.). In three respects the punishment of *majestas* differed from the punishment of treason. (1) The execution often took place at Rome in some strange and barbarous manner, as burning alive, or exposition to wild beasts (Mackenzie, bk. vi. ch. iv.); in England, since 1870, the traitor is simply hanged, the more barbarous parts of the sentence previously in use having been abolished (33 & 34 Vict. c. 23, s. 31). (2) *Infamia* and confiscation of goods

followed at Rome. By the Act of 1870, no forfeiture for treason now takes place. (3) At Rome the criminal might be tried even after his death in cases of *majestas* (Mackenzie, pt. vi. ch. iii.); this is not the case in England.

4. Adultery is not a crime in English law, but simply a ground for dissolution of marriage if committed by the wife, for judicial separation if committed by the husband.

The *nefanda libido* is punishable with a maximum sentence of penal servitude for life (24 & 25 Vict. c. 100, s. 61).

Simple fornication (*stuprum sine vi*) is no crime in English law unless the girl be under the age of thirteen. If she be under twelve it is a felony; if between twelve and thirteen, a misdemeanor, though the act be with her consent (38 & 39 Vict. c. 94).

5. Homicide has been adopted as an English term. Originally homicide was perpetrated openly; murder was the secret slaying of a foreign and known person, presumed to be *Francigena* unless *Englescheria* were proved. If the slain man was proved English, *murdrum* was not assigned (Bracton, 134 b). At the present time homicide is a comprehensive expression for all the means by which life is lost; it may be either felonious or non-felonious. If felonious, it is either murder or manslaughter; if non-felonious, either justifiable, excusable, or by misadventure (4 Stephen, bk. vi. ch. iv.; Roscoe, Crim. Evid., *s.v.* "Homicide").

Poisoning is provided for in England by 24 & 25 Vict. c. 100. The maximum punishment for attempting to murder by poison is penal servitude for life.

By 9 Geo. II. c. 5, no prosecution is for the future to be carried on against any person for witchcraft, sorcery, enchantment, or conjuration; but pretended craft, by

palmistry or otherwise, is punishable by 5 Geo. IV. c. 83, s. 4. A spiritualist was held to be rightly convicted under this Act in *Monck* v. *Hilton*, 2 Ex., D. 268.

The public sale of poison is not in itself a crime in England. The sale is, however, regulated by 31 & 32 Vict. c. 121, and a breach of the statutory regulation may constitute an offence. See *Berry* v. *Henderson*, L. R. 5 Q. B. 296, for an instance.

6. In English law parricide is punished like any other murder.

7. Stealing, injuring, or concealing wills is provided for by 24 & 25 Vict. c. 96, s. 29; forgery of wills by 24 & 25 Vict. c. 98 s. 21. The maximum punishment in both cases is penal servitude for life. An English will is not sealed (see note to Bk. II. Tit. X. 3).

8. *Vis publica* has some analogy to riot, rout, or unlawful assembly, *vis privata* to forcible entry. For riot, etc., see Roscoe, Crim. Evid., *s.v.* "Riots." It appears that the distinction between unlawful assembly, rout, riot, and even treason, is rather a distinction in degree than in kind (*ib.*). For forcible entry see Tit. II. 1. *Invasio* was a civil trespass; *vis privata* corresponds more nearly to forcible entry in being a criminal offence.

*Raptus* probably includes both the rape and abduction of English law. By 24 & 25 Vict. c. 100, and 38 & 39 Vict. c. 94, the maximum punishment for rape is penal servitude for life. By the same Act the maximum punishment for abduction is penal servitude for fourteen years.

9. Misappropriation of the public revenue is punishable in England on an indictment for larceny of the ordinary kind, on an indictment for defrauding the revenue as a common law offence, as in *R.* v. *Bembridge*, 6 East, 136, or by impeachment, as in *R.* v. *Lord Melville*, 29 St. Tr. 549.

Sacrilege is, by 24 & 25 Vict. c. 96, s. 50, punishable by penal servitude for life as a maximum punishment.

Magistrates and public officers are indictable for misbehaviour or fraud in their office, even without alleging corrupt motives (*R.* v. *Sainsbury*, 4 T. R. 551). In cases of misdemeanour by high public officials, they may be proceeded against by information.

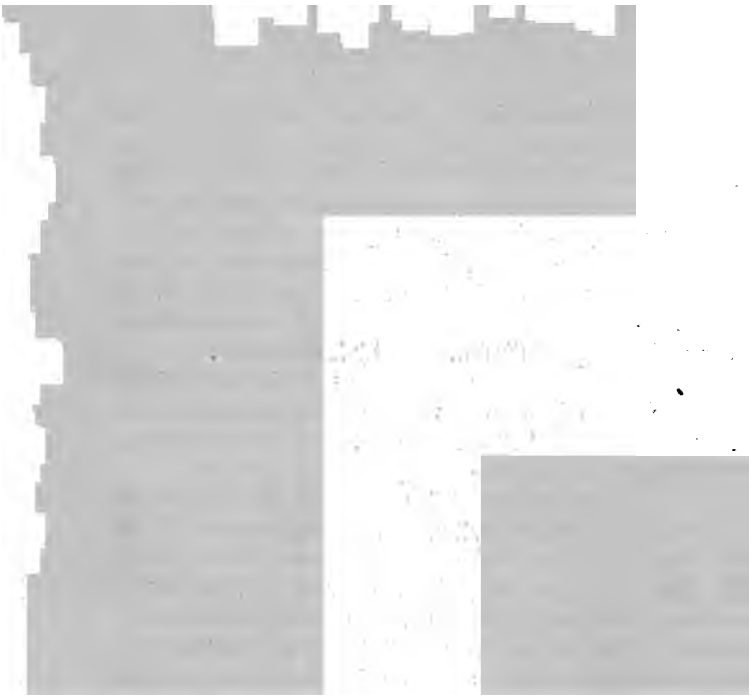
10. The nearest approach to the punishment of the *plagiarius* would be the penalties imposed under the Habeas Corpus Act, 31 Car. II. c. 2, for the illegal detention of prisoners.

11. By English law, bribery, except in the case of elections (17 & 18 Vict. c. 102 (parliamentary), 35 & 36 Vict. c. 60 (municipal), and customs officers, 39 & 40 Vict. c. 36, s. 217), is a common law, and not a statutory offence. Such a case as *Vaughan's Case*, 4, Burr. 2494, where a conviction was obtained for attempting to bribe a cabinet minister for the purpose of procuring an office, would no doubt have fallen at Rome within the *lex Julia de ambitu*. The *lex Julia repetundarum* would also correspond to some extent with bribery, for bribery means the receiving as well as the offering (1 Hawk., P. C., bk. i. ch. lxvii. ss. 1–3).

With the *lex Julia de annona* compare the obsolete English offences of forestalling, regrating, and engrossing, abolished by 7 & 8 Vict. c. 24.

With the *lex Julia de residuis* compare the case of *R.* v. *Martin*, 2 Camp. 268, where an overseer was held punishable for neglecting to give credit in account for a sum of money paid by the father of a bastard child as a compensation to the parish.

The punishment of the common law offences of bribery, extortion, etc., is by fine or imprisonment, or both. See Roscoe, Crim. Evid., *s.v.* "Offences."



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AND

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